Is It Time to Scrap Self-Regulation of the Bar?

BY JAMES K. DORSETT III

The North Carolina State Bar was created by the General Assembly in 1933 as an agency of the state to regulate the practice of law in the public interest. Now, in the wake of a highly publicized lawyer disciplinary proceeding, the bar faces calls by some consumer advocates, legislators, and lawyers for an end to the right of the profession to govern itself. It is therefore appropriate to ask whether lawyers have effectively policed their profession, and what an end to self regulation might bring.

Jack Ambrose

The Mandatory Bar in North Carolina

All lawyers in active private practice in North Carolina are required to be members of the North Carolina State Bar. The State Bar adopts and enforces the rules of professional conduct by which lawyers are bound, sets the standards for legal education and admission to the practice, and provides assistance to clients and lawyers through its committees and boards. The State Bar is operated by a *council* of 55 volunteer lawyers who are elected by their peers in the state's 39 judicial districts. The councilors, the four officers they elect, and three appointed lay members each donate hundreds of hours annually to serve the public and the profession, at no cost to taxpayers. Their work includes the following:

- The council and the *Board of Law Examiners* enforce high standards for admission to the Bar to ensure the public is provided with highly educated and skilled practitioners of good character and fitness for the practice.
- Through its *Grievance Committee*, the council reviews complaints against lawyers to determine whether ethical violations have occurred and decide the appropriate disposition of cases. This committee, with staff counsel and investigators, reviews the 1,500 - 2,000 complaints filed each year. The members are devoted to imposing impartial discipline where violations have occurred, dismissing frivolous complaints, and referring contested cases or those involving serious misconduct or lawyer impairment for hearing before

the independent *Disciplinary Hearing Commission* (DHC). Decisions of the DHC may be reviewed by the North Carolina Court of Appeals. Lawyers who abuse their positions of trust are appropriately punished, and those who engage in serious misconduct often find themselves without a license to practice and facing criminal indictment.

- The *Client Assistance Program* answers approximately 20,000 calls each year from disaffected clients and intervenes with lawyers to resolve problems. In most cases the program succeeds in restoring communications between lawyer and client and resolving the issue which led to the call, without resorting to the formal grievance process. Fee disputes are resolved or referred for mediation or arbitration.
- The *Client Security Fund Board* awards compensation to clients who have been harmed by attorney malfeasance up to $100,000 for a single claim. In its last fiscal year, the fund reimbursed clients a total of $446,146.80. These awards are made possible entirely through assessments paid by members of the State Bar.
- Volunteer lawyers serving through the *Lawyer Assistance Program* provide one-on-one mentoring for lawyers suffering from substance abuse or depression. The Bar boasts a success rate of 85% recovery for those lawyers who complete the LAP program, thus saving clients, lawyers, families, and lives.
- The *Ethics Committee* and staff provide both formal and informal advisories concerning attorney conduct, affording thoughtful and skilled guidance to lawyers and the public.
- The State Bar through its *staff auditor* performs random procedural audits of lawyers' trust accounts, in order to ensure that lawyers understand and apply the rules designed to prevent mishandling and misappropriation of client funds.
- Through its *Authorized Practice Committee*, the State Bar prevents persons who lack legal training and skill from engaging in false advertising or harming citizens by providing bogus legal services.
- The *IOLTA Board* collects interest on trust accounts from lawyers participating voluntarily in the program, and approves grants each year totaling about $3,000,000 to organizations that provide free legal services to the poor in North Carolina.
- Through its mandatory *continuing legal education* requirements and voluntary *legal specialization program*, the Bar seeks to ensure citizens' access to highly competent professionals to handle their legal needs.

Through these and other initiatives, the State Bar regulates the practice of law—in the public interest—at no cost to North Carolina taxpayers. All of the funding for our excellent programs and staff is derived from member dues and other sources.

For more than 70 years, the citizens, practicing lawyers, and the courts in North Carolina have been well served by this system. The State Bar is accountable for its operations to the General Assembly, and the Bar's books and records are reviewed annually by an independent auditing firm and by the state auditor. Rule changes proposed by the State Bar are subject to review and approval by the North Carolina Supreme Court. Thus, regulation of the profession in North Carolina is subject to ample safeguards and checks and balances. The State Bar employs outstanding staff attorneys, who understand the profession and its core values and role within our system of justice, and a professional team of investigators and support personnel. Finally, the roughly $6,000,000 in operating costs for the State Bar and its boards and agencies, not to mention millions more in volunteer time, is provided free of charge to North Carolina's citizens.

Loss of Self-Regulation

Were self-regulation abolished, the public and the bar would lose the benefit of these excellent programs and the other services provided by the State Bar. In place of a cost-effective program of governance in the public interest by experienced and dedicated volunteer lawyers and lay persons, overseen by the General Assembly and the supreme court, the profession likely would be regulated by some new bureaucracy created and run by persons lacking a full understanding of our system of justice and the critical role played by an independent legal profession in a free society. The public likely would be plagued by an absence of effective regulation and a loss of quality control.

In some societies the principle of "caveat emptor" prevails in the provision of legal services. Absent effective regulation, the untrained, unskilled, and unscrupulous are left free to provide "legal services" to those who will hire them, often at great cost to the client's rights and financial well-being. Those providing legal services are not required to

follow ethical standards like those mandated by our rules of professional conduct, enforced by our grievance process, and backed by our Client Security Fund. Principles such as preserving client confidentiality, avoiding conflicts of interest, and zealously promoting client needs may be ignored with relative impunity. The courts may provide a remedy for losses, but only for clients able to afford the risk of litigation and of attempting collection. Absent effective licensing, rule making, and disciplinary procedures, untrained advocates play havoc with the courts' ability to decide cases.

In other societies, the legal profession has been regulated by central or local governments. The results have included a loss of the profession's independence, erosion of the rule of law, and harm to the system of justice. The regulators lack expertise, programs lack adequate funding, and the costs of such regulation are borne by citizens. The public as well as the bar are poorly served.

Governments have sometimes opposed even the existence of an independent legal profession, which tends to curb the power of tyrants. For example, the 1669 Fundamental Constitutions of Carolina[1] expressly forbade the existence of a professional bar in the colony.

Some well-meaning individuals call for the replacement of professional self-governance with regulation by Congress or the state legislatures. Such regulation would be free from oversight by the state supreme courts, as now provided in all 50 states. One must ask a number of questions about such a new regulatory scheme, along the following lines:

Would one of these regulatory models be more productive than our current system in providing protections and benefits to clients and society? Would the new regulators bring a higher degree of expertise, experience, and dedication to the tasks of setting standards for lawyer education and admission, enforcing rules of professional conduct, and providing for client protection than that currently provided by the volunteer lawyer and lay councilors and State Bar employees?

Would the new regulatory scheme and its programs be adequately funded and staffed with skilled and effective personnel? What government employees or appointees would replace experienced volunteer councilors? How and at what cost to citizens would clients' losses and needs, as well as lawyers' problems, be addressed? Under the guise of removing barriers to entry and reducing costs to consumers, who in addition to trained lawyers might be permitted to provide "legal services" to unsuspecting consumers, and with what resulting harm? What "ethics rules" might another body enact and seek to enforce, and with what effect upon lawyers' independence, performance, and the public's confidence in the system of justice? Would the operation of the courts be harmed? How would IOLTA funding for legal services for the poor be replaced? Would random procedural audits of lawyers' trust accounts be provided as at present? Would the new system be efficient in meeting challenges posed by rapid changes in society, business, and the law?

One can easily foresee that an end to self regulation of the legal profession would create far more problems than it would solve. While most congressmen and state legislators are able and dedicated public servants, many lack the experience, interest, and time required to regulate the legal profession. In doing so, federal or state lawmakers would have to create a bureaucracy for this purpose or delegate the regulatory functions to some other body.

It is difficult to imagine Congress or a federal agency effectively handling client complaints, lawyer discipline, and the interpretation and application of the fine points in the rules of ethics for all of the 50 states. Almost as difficult to picture is a state legislature devoting the time, resources, and expertise needed to replace and improve upon the current system of professional self-governance. What is easy to foresee is that resources needed for serious disciplinary cases and ethical issues could be diverted to those involving prominent individuals or headlines, or to unrelated programs.

Moreover, if Congress or state legislatures put on the regulatory mantle, a host of special interests would lobby for rules perceived as favorable to their constituents. Current rules designed to prevent persons without training, skill, and character from preying on citizens, as well as rules to prevent false advertising, might be cast aside under the guise of deregulation.

How would the lawyer's role change if a legislative body or consumer board wielded the power to admit, regulate, and disbar? Would lawyers without independence forgo their higher duties to society, the courts, and the rule of law under the pressure of client or governmental demands or improper influences? Would lawyers be likely to take tough but important cases where the government or those having influence in it were involved? It is certainly arguable that a legislative system of governance could have a chilling effect upon lawyers' willingness to advocate positions disfavored by the government that licenses and regulates them. Effective advocacy for those who dissent from governmental policies could be eroded.

Conclusion

Much of the antipathy directed towards the legal profession arises from a misunderstanding of the adversary system of justice, the role of lawyers in society, and the relatively few yet notorious cases of serious lawyer misconduct. This view ignores the fact that an independent legal profession has been essential to preserve the rule of law in our country and the rights and freedoms our citizens enjoy.

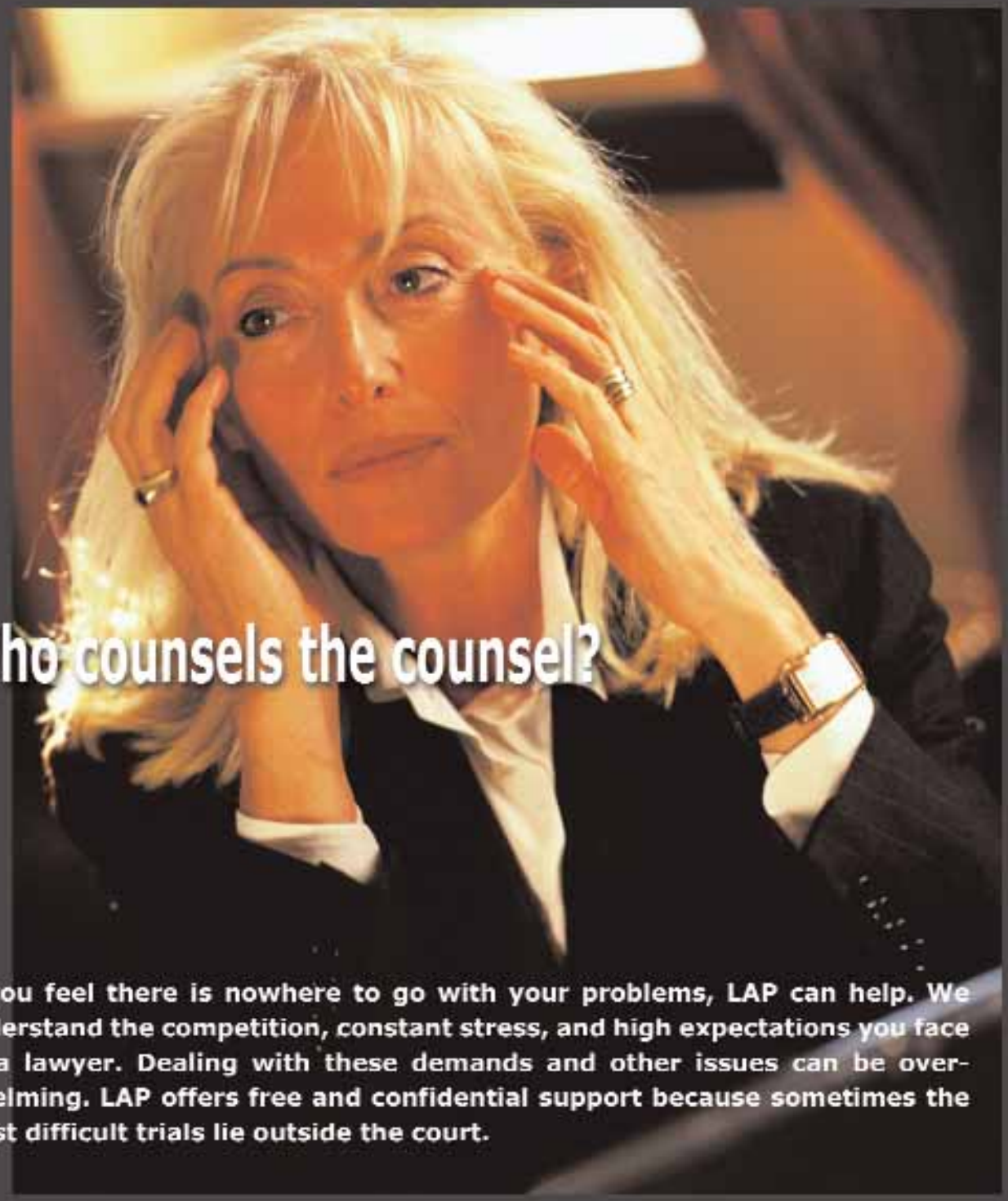
The bar should strive always to promote regulation that serves the public interest. Lawyers also must find ways to make legal services more available and affordable to the poor and middle class. At the same time it is critical that we preserve the independence and self-governance of the legal profession. No dispute over a single or even a few disciplinary cases in our long history of service can be allowed to harm our profession and the citizens we serve. ■

James K. Dorsett III, a former State Bar president, currently, serves as president of the American Counsel Association and as a member of the American Bar Association House of Delegates. He is a senior commercial litigation partner with Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan in Raleigh.

For divergent treatments of the subject of lawyer regulation, the author acknowledges and refers the reader to Benjamin H. Barton's analysis found at 37 GA. L. REV. 1167 2002-2003 and Allen Blumenthal's article appearing at 3 KAN. J.L. & PUB. POL'Y 6 1993-1994.

Endnote

1. "It shall be a base and vile thing to plead for money or reward; nor shall any one (except he be a near kinsman, not farther off than cousin-german to the party concerned) be permitted to plead another-man's cause, till, before the judge in open court, he hath taken an oath that he doth not plead for money or reward, nor hath nor will receive, nor directly nor indirectly bargained with the party whose cause he is going to plead, for money or any other reward for pleading his cause."



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North Carolina Observations on Federal Jurisdiction under the New Class Action Act

By Jerry Hartzell

In enacting the Class Action Fairness Act of 2005,[1] Congress provided a fundamental redefinition of federal jurisdiction over state-law class actions. The legislation arose from a congressional determination that state courts are not the best forum for deciding class cases with substantial out-of-state effects. The new Act broadens jurisdiction *per se*, but then retracts some of the breadth by providing for federal courts to "decline to exercise" jurisdiction under many circumstances.

Bruno Budrovic/SIS

North Carolina has not been a center of class action litigation,[2] and North Carolina was not perceived to be part of the problem that the new Act was intended to rectify. Nonetheless, in at least one way the new Act could affect North Carolina more than most other states: the "certified question" procedures that the Act's supporters claim will allow states' highest courts to retain an element of control over the meaning of their state's laws is unavailable in North Carolina.

Beyond this, North Carolina will be affected as all states are: more class cases based on state law will either end up in, or will take a detour through, federal court. The most definite result may be uncertainty and delay, as federal courts are asked to interpret the meaning of complicated new rules for determining federal jurisdiction in connection with class cases, and as federal judges determine whether they may or must decline to exercise the jurisdiction that the new Act has conferred.

Congressional Findings about State Courts

As part of the Act, Congress adopted find-

ings that recognize the legitimacy and value of class actions permitting "the fair and efficient resolution of legitimate claims." Congress also found "abuses of the class action device," and that "[c]lass members often receive little or no benefit from class actions." The findings conclude with the observation that forms the basis for the expansion of federal diversity jurisdiction over class cases:

> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, *in that state and local courts* are—
>
> (A) keeping cases of national importance out of federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-state defendants; and
>
> (C) making judgments that impose their view of the law on other states and bind the rights of the residents of those states."

(Emphasis added.)[3] Thus, according to Congress, "state and local courts" were among the culprits creating class action problems.

North Carolina Courts Not Part of Problem

As an initial observation, it seems fair to conclude that North Carolina courts were *not* among the culprits. Proponents of federal class action legislation were not reluctant to criticize state systems they regarded as unfair, and North Carolina was not a target of their criticisms.

One of the most vigorous proponents of federal class action reform legislation has been the US Chamber of Commerce. For four years its US Chamber Institute for Legal Reform has published an annual assessment of state courts based on a poll of "in-house general counsel or other senior litigators at public corporations."[4] In this poll North Carolina courts have always ranked in the middle of the pack. With a "1" signifying the state legal system corporate counsel regard as best (Delaware) and a "50" the worst (Mississippi), North Carolina has ranked from 16th in 2001 to 20th in 2004. In its treatment of class actions, North Carolina's 2004 ranking was 14th.[5]

One of the US Chamber's allies in its efforts to change the legal landscape affecting business interests has been the American Tort Reform Association,[6] which has used colorful language in identifying "judicial hellholes" in a report issued in 2004. The 2004 report lists nine jurisdictions as "hellholes," such as Madison County in Illinois, the entire state of West Virginia, and, closer to home, Hampton County in South Carolina. Four additional courts, such as the Supreme Court of Utah, were identified as worthy of "dishonorable mention." North Carolina's courts have avoided the ATRA's criticisms.

Moreover, the North Carolina courts do not seem to have engaged in the congressionally identified problem of "making judgments that impose their view of the law on other states and bind the residents of those states." Congress would doubtless have approved of the restraint that North Carolina trial courts are required to observe by the North Carolina Court of Appeals' decision in *Stetser v. Tap Pharmaceuticals*,[7] an opinion by Chief Judge Martin holding that the Due Process Clause bars a North Carolina court from certifying a national class against out-of-state defendants applying other states' laws.[8] The use of a state court in one state to prescribe remedies for out-of-state residents based on their home states' laws (such as, for instance, a North Carolina court adjudicating New York residents' rights to recover based on New York law) was at the heart of the concerns expressed by many commentators on the Act, including the judges in the Federal Judicial Conference.[9]

Federal Court Interpretation of State Law

To the extent the new Act increases the flow of state-law cases to federal court, it can be expected to create strains on "judicial federalism." For cases that do end up staying in federal court, this strain could be particularly acute in North Carolina.

Under our dual state/federal system of law and governance, a state's highest court is supposed to be the ultimate arbiter of the meaning of that state's laws. This, of course, is the familiar *Erie* rule, after *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). A federal court faced with a state law issue is tasked with responsibility to make a prediction or "*Erie* guess" as to how the state's highest court would decide the issue.

The body of law that has built up around the "*Erie* guess" process includes a well accepted concept of deference: that federal courts should, if possible, avoid these guesses as to state law when the state-law issue is truly unclear and the issues involved are significant. A recent Eleventh Circuit case states the principle: "Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law."[10] The phrase "interpret or change" seems noteworthy: we all recognize that courts, particularly appellate courts of final jurisdiction, not only "interpret" the law, they also "change" it.[11]

Both federal judges, speaking through the Federal Judicial Conference, and state judges, speaking through the Conference of Chief Justices, expressed concern about the effect of increased federal court diversity jurisdiction on judicial federalism. The Conference of Chief Justices referred to earlier versions of the Act as representing "an unwarranted incursion on the principles of judicial federalism underlying our system of government."[12] In 1999 the Federal Judicial Conference opposed federal class action jurisdictional changes "based on concerns that the provisions would add substantially to the workload of the federal courts and [were] inconsistent with principles of federalism."[13]

In March of 2003, however, the Federal Judicial Conference softened its opposition, so long as "federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed . . . ." In fact, such state court jurisdiction over "in-state class actions" was not "left undisturbed." The Act expands jurisdiction, but creates mandatory and discretionary rules under which the federal courts will or may "decline to exercise" the jurisdiction they possess.

For state-law cases that do remain in the federal courts, the Senate committee report gave one suggestion for preserving judicial federalism—the use of a "certified question" process:

> [I]f federal court judges are not familiar with state law on a particular issue, they have the authority to ask a state court to "certify" a question of law e.g., to advise them how a state's laws should be applied in an uncharted situation. This procedure allows the federal courts to apply state law appropriately and gives states the ability to manage their legal systems without becoming bound by other states' interpretations of their laws.[14]

Unfortunately, the certified question process (whatever its merits) is unavailable in North Carolina: North Carolina is one of two states that does not permit this procedure.[15]

The Upcoming Debate About What the New Act Means

Traditionally, rules governing federal jurisdiction have at least had the appearance of being relatively clear, and have been interpreted relatively consistently. Certainly there are arcane issues that emerge in connection with the "arising under" and diversity language of 28 U.S.C. §§ 1331 and 1332. However, the basic statutory standard for federal jurisdiction is simply stated and reasonably well understood.

In contrast, the new class action federal jurisdiction statute is quite complex, and its structure and syntax seem to be modeled after the Internal Revenue Code. Class actions based on state law will (with some exceptions) be subject to federal jurisdiction so long as $5 million or more is in controversy, and so long as there is some minimal element of diversity. The diversity element will be far less meaningful than formerly, satisfied if any plaintiff is a citizen of a state different than any defendant. The Act creates exceptions to this grant of federal jurisdiction.

As noted above, the Act also creates another category of cases as to which federal judges are *required* to "decline to exercise" jurisdiction, and it creates yet another category of cases as to which federal judges *may* decline to exercise jurisdiction, prescribing multi-factor tests for each. These rules are too intricate to permit reasonable summary. In short, however, the greater the extent to which a class case concerns North Carolina plaintiffs, North Carolina law and North Carolina defendants, the greater the likelihood that the case will be remanded or relegated to state court.

While a succinct summary of the jurisdictional provisions of the Act may be impossible, it is easy to conclude that these provisions are complicated, that they break much new ground, and that interpretation of the Act will consume judicial resources for a number of years.

Judicial Resources

Responding to a criticism that the new Act would "result in delays for injured consumers," the Senate report dismissed this criticism as stemming from "baseless concerns about the federal courts' caseload."[16] I have had the privilege of hearing two federal judges, both from districts outside North Carolina, speak publicly about the new Act. These federal judges were indeed concerned about their case loads, and their observations certainly seemed to be based on solid information that the judges knew from first-hand experience.

A recent issue of *The Third Branch*, the "newsletter of the federal courts,"[17] describes the federal courts' substantial resource problems (increasing caseload, reduced funding), and describes the anticipated case load from the new Act as a contributing factor. However while the federal courts' budget problems are real, the federal courts in North Carolina are not among the district courts with the most acute case loads. According to data published by the Administrative Office of the US Courts, using pending cases per judgeship as the measure of docket load, the Eastern District of North Carolina was the 25th most congested out of 94 districts.[18] The Middle and Western Districts ranked 67th and 64th respectively.

Conclusion

The new Act will accomplish the widely shared objective of reducing the risk that a state court in one state will enter a ruling affecting plaintiffs and defendants from other states in cases based on the other states' laws. The Act reduces this risk with a complex set of rules that will permit judicial discretion in some circumstances and will require federal judges to "decline to exercise" jurisdiction in other cases. Whether the benefits of the new Act will outweigh the cost in legal resources arising from its complexity and uncertainties remains to be seen. From a purely North Carolina perspective, the Act seems to have been unnecessary. Congress, of course, does not legislate from a purely North Carolina perspective. ■

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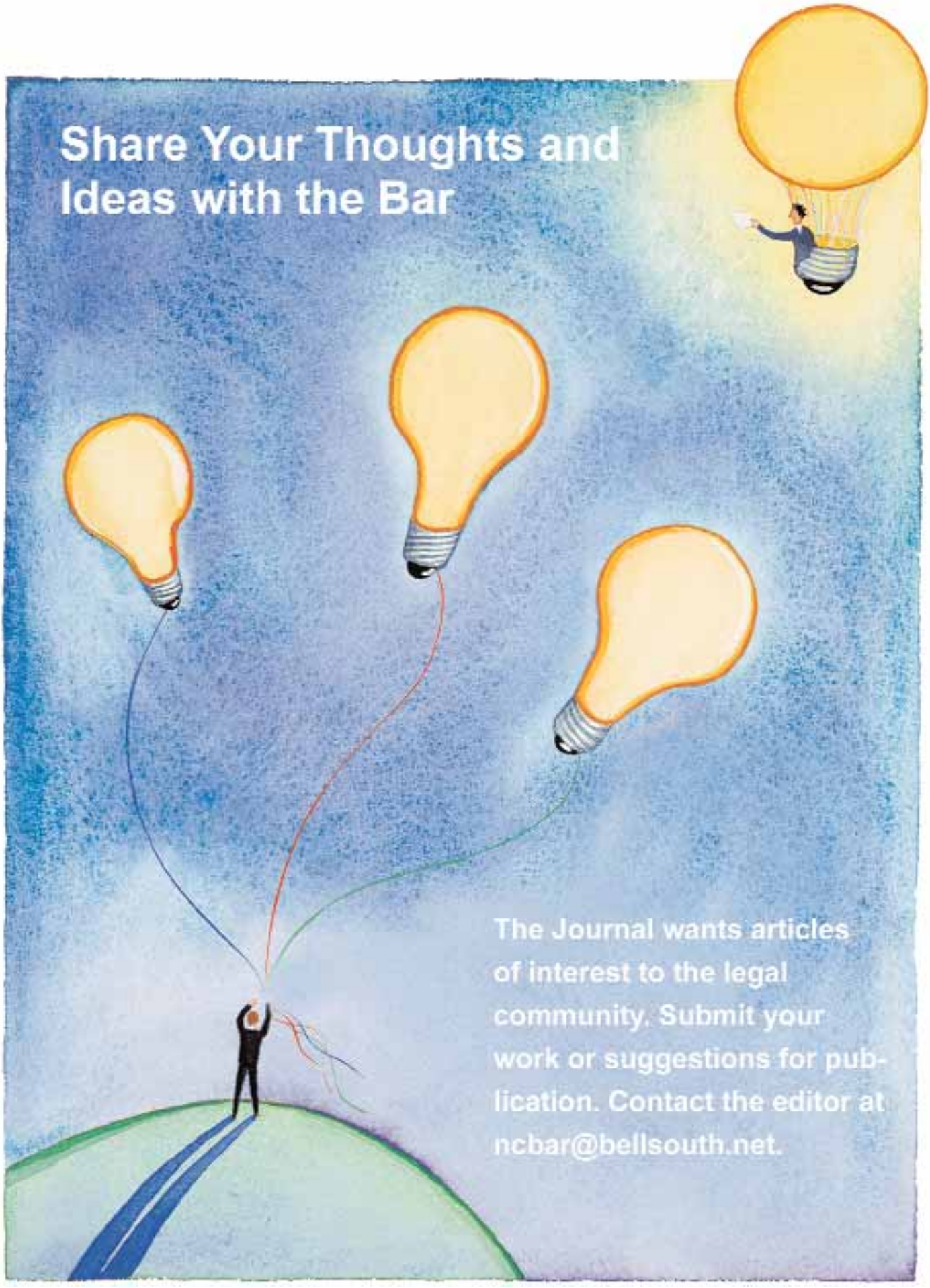
Endnotes

1. Public Law 109-2 (enacted February 10, 2005).
2. As to the class action case load in federal courts in North Carolina, data published by the Administrative Office of the United States Courts indicates there were 5,179 (putative) class cases pending in the federal courts as of September 30, 2004. The federal district courts with the largest number of class cases were the Southern District of New York (1,063 cases), the Northern District of California (561 cases), the District of Maryland (431 cases) and the Northern District of Illinois (275 cases). In contrast, the Eastern, Middle, and Western Districts of North Carolina had pending nine, ten, and five class cases, respectively. Administrative Office of the United States Courts, Judicial Business 2004, Table X-4 (available on the web at www.uscourts.gov/judbus2004/contents.html).
3. Class Action Fairness Act of 2005, section 2.
4. 2005 State Liability Systems Ranking Study, p. 5 (www.instituteforlegalreform.org/harris/pdf/HarrisPoll2005-FullReport.pdf)
5. www.instituteforlegalreform.org/harris/pdf/HarrisPoll2005-Summary.pdf, Table 9.
6. www.atra.org/. A link to ATRA's study appears in the Chamber's web site. http://www. uschamber.com/press/releases/2004/december/04-163.htm.
7. 165 N.C. App. 1, 598 S.E.2d 570 (2004).
8. 165 N.C. App. at 22-25, 598 S.E.2d at 585-87.
9. See letter of March 26, 2003, from Leonidas Ralph Mecham to Senator Orin Hatch, transmitting and explaining the Judicial Conference's unanimously adopted recommendation dated March 18, 2003. A copy of this letter appears on the Association of Trial Lawyers of America website at http://www.atla.org/homepage/fjc.pdf.
10. *Tobin v. Michigan Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005).
11. *See, e.g., Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 472-73, 515 S.E.2d 675, 691 (1999).
12. See letter of March 28, 2002, from Annice M. Wagner, president of the Conference of Chief Justices, to Senator Patrick M. Leahy, chairman of the Senate Committee on the Judiciary, available at http://www.atla.org/homepage/ccj.pdf.
13. See letter cited in note 10, at p. 2.
14. Senate Report 109-14, Section VII, response to "Critics Contentions no. 8" (available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=sr014.pdf&directory=/diskb/wais/data/109_cong_ reports).
15. Jessica Smith, "Avoiding Prognostication and Promoting Federalism: The Need for An Inter-Jurisdictional Certification Procedure in North Carolina," 77 N.C.L. Rev. 2123 (1999). A quick update to Ms. Smith's research indicates there are now only two states that do not have a certified question procedure: North Carolina and New Jersey.
16. Senate Report 109-14, Section VII, response to "Critics Contention no. 7."
17. *The Third Branch*, Vol. 37, Number 4-April 2005 (available at http://www.uscourts.gov/ttb/apr05ttb/hardships/index.html
18. Federal Court Management Statistics 2004 (available at www.uscourts.gov/cgi-bin/cmsd2004.pl. That is, there were 24 federal districts with more cases per judgeship than the Eastern District. Ranking based on "weighted filings" (filings adjusted for case complexity) are roughly comparable.

Share Your Thoughts and Ideas with the Bar



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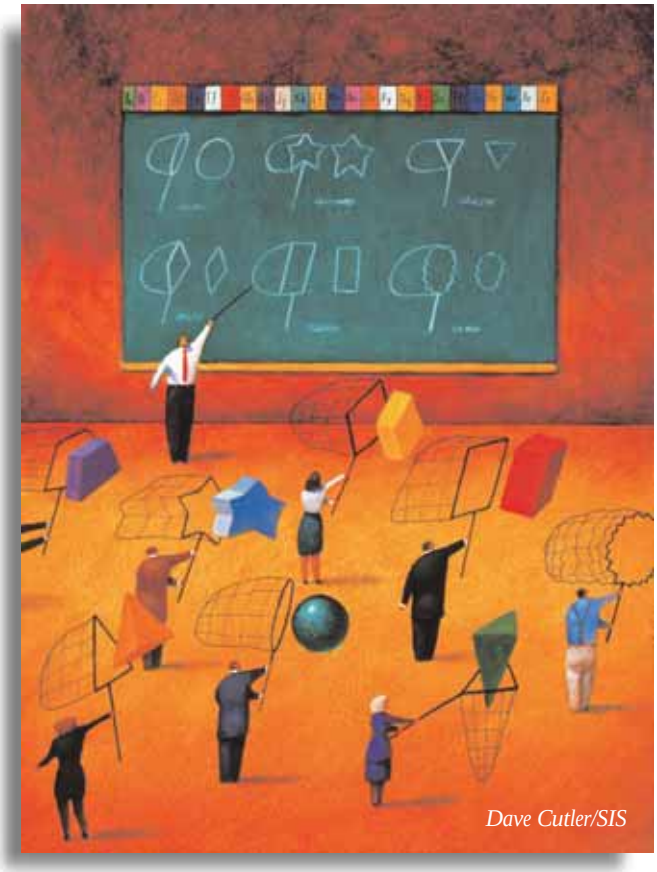
What I've Learned
(With apologies to the *Esquire Magazine* column of the same name.)

BY JOE CRAIG

State Bar Counselor Jan Samet—who represents Judicial District 18-B (High Point), is chair of the State Bar Publications Committee, and is a close friend—asked me to write this article, based upon my experiences as a superior court judge. I have now been a superior court judge for three and one-half years, and Jan has been after me for at least a year to write this article. But I don't believe I could have written this article with any clarity sooner than now.



Dave Cutler/SIS

I ceased practicing law and became a superior court judge when Governor Easley appointed me to the seat vacated by retired Judge Rick Greeson. I took the oath of office in late February 2002 and held my first session of court in early March. At first, it was hard to adjust after being a litigator for nearly 20 years. I remember walking down a corridor of the Guilford County courthouse with my bailiff. As I walked toward the courtroom, all of the court personnel I encountered greeted me with "Hello, your Honor," or "How are you, Judge?" I asked the bailiff how they knew I was a judge, and he said, "Could be that black robe you're wearing."

There is indeed an aura that surrounds the wearer of a black robe. Folks approach you with an air of deference and even the occasional obsequiousness. People always laugh at my attempts at humor, even when my witticisms would not have elicited a grunt when I was a mere lawyer. I can see how some individuals who ascend to the bench quickly succumb to the "Black Robe Disease." While I'm still less than totally comfortable in my role, I'm beginning to get used to it and can understand how a certain distance must be main-

tained. But I've felt absolutely no desire to become as cloistered as a monk, nor have I felt that I needed to. I've always possessed a gregarious personality and I try to reach an equilibrium point between approachability and the constraints that my position places upon me.

In my courtroom, I am the judicial incarnation of a Post Captain in the British Royal Navy, *a` la* Jack Aubrey. I walk the quarterdeck on Punishment Day with an authoritative air, sometimes beneficent, sometimes morally superior, occasionally wrathful, as I dole out punishment to those on the lower deck's defaulters list. The bailiffs are the Royal Marine guards; the courtroom clerk is my purser; the court reporter, like a scrivening clerk, dutifully takes down everything I say. The DA is my coxswain and the defense attorneys my officers and midshipmen. If my countenance darkens, one "mid" will mutter to another, "Watch out for squalls."

But in reality, the command structure of the judiciary is such that superior court judges are not the military equivalent of admirals or generals; I am more akin to a front-line platoon sergeant or chief petty officer. I am always in the heat of action but am constrained to obey the commands from the appellate judges on high.

Here's what I've learned:

There is no rule that prohibits me from treating everyone—from esteemed colleagues to the lowliest defendant—with respect. In short, my mantra has always been, "be nice." The wearing of the black robe doesn't change this precept. Politeness, kind words, and expressions of understanding, even sympathy (when appropriate) never hurt. The most hardened criminals will respond to a modicum of kindness (unless they are sociopaths). I've even had a defendant in a capital case tell me, after I've sentenced him to death, that I'd treated him fairly and that he appreciated my politeness to him.

That's not to say that all persons respond positively to my being a "nice guy." One defendant, who received a moderate (but active) prison term for phoning in a bomb threat to his workplace, muttered as he was being led away; "that fat old m____ f____ was easy on everybody else." I had the bailiffs bring him back to the courtroom; I told him that I may be fat and was getting older by the day, but that I did not suffer from an Oedipal complex. I found him in contempt of court and gave him 30 extra days, to be tacked on at the end of his prison term.

Sprinklings of occasional humor in the courtroom go nicely with my avuncular disposition but I've learned that it's best to keep it harmless or self-deprecating, for the most part. I never make jokes at the expense of the litigants who are invariably edgy: they view their day in court as being on par with having a tooth pulled at the dentist's office. But they seem to enjoy an occasional jibe at a bailiff or good-natured attorney. My aim is to reduce the level of tension among participants. But some situations *never* allow me to exercise my sense of humor; a man facing the death penalty or life imprisonment, in a courtroom full of vengeful members of the victim's family, is not in the mood for chuckles, nor should he be.

I've learned that imposing courtroom dress codes from on high doesn't work. But the *sans culottes* in my court can often be made to realize that if they stand before me in sartorial disarray, just at the moment that they want me to do something for them (e.g., continuance, lenient sentence, continued probation, etc.), I

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6:00 PM Reception, 7:00 PM Dinner
North Ridge Country Club

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may be guided roughly by Mark Twain's famous adage that "Clothes make the man; naked people have little or no influence upon society." So at Calendar Call, I tell the assembled multitude that they can wear whatever they wish to court, so long as it's not obscene or indecent. But if they dress sloppily, I might get the wrong impression that they don't care about their fate or are being defiant. By the next day, most of the participants have experienced a fashion epiphany. But the key is: they've been given the chance to make their own decision.

I've learned to let the lawyers perform their roles in the courtroom with a minimum of interference (assuming that a lawyer isn't prone to seize the bit in his teeth). Attorneys labor under a large burden of stress during a trial, whether it's the young ADA whose chief expects a "win" in a difficult case, or the lawyer in private practice whose client, having paid the "big bucks," demands that he or she eke out a victory. They do a much better job for their client if they don't have to worry about some guy in a black robe taking pot shots at them from the bench for pure sport. My 20 years as a litigator taught me that a lawyer has enough distractions swirling around his counsel table without having to put up with unnecessary carping from the judge. With this in mind, if a lawyer gets out of line or is making a hash of courtroom procedure, I call him or her up to the bench for a *sotto voce* chewing-out that neither the jury nor the client can hear. The offending attorney gets the message loud and clear, but isn't embarrassed in a manner that might influence the outcome of the trial.

Bench conferences can also be used to defuse potentially explosive situations. I once tried a personal injury action between a first-year attorney and a grizzled old veteran. Every time I sustained an objection to the youngster's questions, he wanted to argue about it by asking to approach the bench. Since this was his first trial, I tried to tolerate his over-eagerness, but his curmudgeonly opponent grew increasingly restive. Finally, during the third or fourth bench conference, in which I was trying to explain the basis for my rulings, the veteran lawyer looked at the kid and snarled, "Aw, shut up, you little weasel." The young lawyer grew visibly upset and protested his outrage at the use of such a pejorative expression, as well he should have. But before things escalated, I simply said, "Look, from my perspective, he's paying you a compliment. When I tried cases against him during my trial lawyer days, he always called me a turkey. A weasel's a mammal, which is higher on the evolutionary scale than a bird. You're earning more respect from him than I ever did." The tension broke, grins all around, and we got back to trying the case, with the jury none the wiser as to what just happened.

Conferences in chambers are a method I sometimes use to put the lawyers more at ease and accomplish the task at hand in a less adversarial manner. If the attorneys are in front of me for a motion and don't have their clients in tow, a discussion in chambers flows along much more efficiently and without the level of posturing one tends to see in court. I am passionate about flyfishing and tie my own flies, so I often bring my tying tools and materials to my chambers to work on flies during lunch. I've been known, on occasion, to listen to the lawyers argue a motion while tying some trout flies. I recall one time in particular; the attorneys were arguing a series of discovery motions as I dawdled with my hooks, feathers, and thread. After I'd made my rulings, I told the lawyer who won the motions to prepare an order for me to sign; I then gave the newly finished fly to the loser and said it was his "consolation prize." The winner looked wistful and said, "Dang, Judge, if I'd known the loser got such a nice fly, I wouldn't have argued so hard."

One last word on chambers conferences: much of a superior court judge's criminal court docket time consists of approving plea arrangements. I've learned that it's best for the DA and defense attorney to approach me in chambers or at the bench if there are unusual circumstances or some problem surrounding the plea. If I'm not happy with the plea arrangement, they can then go back and attempt to salvage the situation rather than face an outright rejection of the plea at the time it's made in open court. Some judges don't like this practice, because it might appear to smack of back-room deal-making. But in essence, that's just what a plea arrangement consists of: the defense attorneys and DAs usually negotiate the plea in a conference room prior to court. If they want to see how I'll react to a scripted plea arrangement or otherwise want my *imprimatur* prior to my getting on the bench, then, for the most part, that's okay with me (so long as it's not *ex parte*); it makes the road a lot less bumpy for everyone than if it's attempted in open court.

I've also learned not to be afraid to profess ignorance of the law to attorneys or court personnel. Judges are far from omniscient, even though folks appear to believe that we know it all. As a practicing attorney, I handled a lot of complex civil litigation but never darkened the doors of a criminal courtroom, except to mishandle the occasional traffic ticket. My second week on the bench, I held a session of court in a rural Piedmont county. I called the district attorneys and defense attorneys to the bench and whispered to them that if I was about to make a mistake, I wanted them to approach the bench and straighten me out before the passage of time compounded the error. I said that when it came to making mistakes, I had no pride and they should not hesitate to help me get corrected while it was still easy to remedy. The lawyers took me at my word and didn't hold my mistakes against me; we got along famously.

On the flip side, if briefs or case law have been submitted prior to a hearing, or if it's an area of the law that I'm familiar with, I've learned to embrace the Socratic Method as a way of sifting through the dirt and detritus to uncover the nugget. In law school, I had a near-pathological dread of ol' Socrates, particularly as practiced by such master torturers as Martin Louis, my Civil Procedure professor at UNC. Marty, God rest his soul, taught me how valuable a tool it can be as I try to figure out what the hell to do up there all alone on the bench. But Marty's cynicism and seemingly satanic

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Changing Times: The "Second Generation" of Women Lawyers Speaks Out on Motherhood

By Maria J. Mangano

In my personal archives, in a folder labeled "Women's Issues," there is a yellowed *New York Times* article dated September 23, 1977, titled *Women Who Waited: Starting a Family after the Age of 30*. One of the women profiled in the article is Ellen Agress, a 30-year-old attorney who was married "for almost five years" before the birth of her daughter. A woman, married at 25, a lawyer, who became a mother at the age of 30. In 1977, this was newsworthy.

Equally newsworthy was a 1980 survey showing, in a "dramatic shift in contemporary public opinion," that for the first time the American public regarded women as equals to men, that it made no difference if a woman was a mayor, a lawyer, a doctor, "even their own boss." According to the article reporting on this survey, this represented a marked change from findings only four years earlier, when "the majority of Americans still believed that if women worked, they should do so as nurses, secretaries, hairdressers, [and] sales clerks."[1]

Now don't get me wrong—I've been lucky enough to work with the best secretary on the planet, and I think my hairdresser walks on water, but I cite these articles to remind us just how recent the entry of women to the legal profession really is. Statistics remind us, too—In 1900, only 1% of all lawyers were female, 60 years later that number had barely budged to 2%. In 1970, it was only about 3%, and as late as 1990 the profession was still approximately 80% male. Today, around 30% of lawyers are women, and 50% of law students.[2] By definition, then, combining motherhood with a legal career is an equally recent enterprise.[3]

Little wonder that in 1987, when my son was born, although I wanted to—and finan-

cially needed to—combine parenting with my career, I wasn't quite sure how to do it. Most of the women lawyers I knew were my class of 1982 classmates, and those who were mothers were as new to the game as I was. Fortunately, I had an involved and supportive husband, also a lawyer, and a good boss. My husband and I decided I would work three days a week, he four, and hire a nanny for the other two. My boss agreed to this plan, pretty sporting when you consider I was the #2 lawyer in a two-lawyer firm. That was almost 18 years ago, and through several job changes, one more child, and a never-ending quest for a happy and balanced life, I've been making it up as I went along ever since.

If you want to know what's going on in the trenches today with the second generation of lawyer-mothers, you need only talk to a few of them and you'll come away impressed by their honesty and eloquence and also by their devotion both to their children and families and their legal and intellectual pursuits. Caitlyn Fulghum, who graduated from Duke Law School in 1998 along with her husband Tom, has a two-year-old daughter and a four-year old son. She says of becoming a parent: "It changed everything about the way I viewed my career. I think having children makes you work because you want to provide well for [them]." In her search for greater flexibility, not long after her son was born, she left her job with a small firm to open her own, subsequently joined by her husband. ("I never thought we would practice together.")

Fulghum limits her practice to employment discrimination and the occasional personal injury case, while Tom focuses on immigration, criminal defense, and appeals. Both she and he each stay home with the children one day per week, and Fulghum estimates that she works about 35 hours per week, and Tom 40. "I have what I consider a full-time job, but I just cram it into the hours I have available, which is, most weeks, 35 hours." She candidly observes that this is far better than having Tom work 75 hours and her staying home full-time: "That would make for two insane people." She describes her job as "generally structured" so that if she is very busy one week, she can usually go back to 35 the next. Fulghum admits that the hardest thing about balancing the demands of two preschoolers and a career is "having any time for yourself—I don't." But when asked if she foresaw any career changes in the near future, Fulghum says she doesn't and that the balance she and her husband have achieved is, overall, a good one: "I couldn't see any other way to do it. I just wouldn't be happy."

The issue of full or part-time work is a critical one for many women lawyers who have young children. Stella Boswell, who graduated from UNC Law School in 1995, and had her first child several years later (her two daughters are now seven and four), has worked in a law firm (full time in litigation), for the North Carolina Academy of Trial Lawyers (full time and later four days a week), and currently works at Duke Law School as a career counselor (15 to 20 hours per week). Part-time work, says Boswell, "enables me not to come home totally tapped out." The move from full time to part time originally came after her second daughter was born and her husband was completing a medical residency. Boswell recalls that working at "a demanding stressful job when your husband is doing the same thing" did not create "the quality of home life we wanted to provide."

As she has searched for congenial working arrangements, Boswell discovered that there is "limited, almost non-existent quality part time legal work" and that even with a part-time job "work demands always come up when you don't expect them" and that these demands have generally resulted in her working more hours than agreed upon. The work demand problem was dealt with by having full-time childcare even when she was working part time (a necessity that came as "a surprise" to her); the issue of quality part time legal work she sees as less of a personal issue than as a societal one, although the legal profession doesn't necessarily see it that way.[4]

Boswell believes that the position of the legal profession has been that they're "your kids and your problem," that the question of how to balance career and parenting obligations are an "individual problem to be individually solved by you." And when an individual woman solves—or tries to solve—the problem by working part time, she takes both a "disproportionate pay cut and a disproportionate status cut." The lasting solutions, feels Boswell, lie in fundamental changes that have yet to fully occur: "How to change the work force? How to change work hours?" But it's obvious Boswell thinks continuing to work for such change is worth it. She keeps discovering, she says, that "my personal happiness is connected to having satisfying and meaningful work."

Sometimes the warnings of how tough it can be to combine motherhood and a law career have an unexpected benefit: the reality is not as bad as the advance press. "It's a lot easier than I thought it would be," says Annaliese Dolph, recently appointed assistant dean for Career Services at UNC Law School, and mother of a one-year-old daughter. "I'm not stressed about being a working mom." This lack of stress seems to have three sources: a job with reasonable hours and some flexibility, a husband with an even more flexible job (he's a network engineer at Cisco who can work from home if need be), and a "great day care situation." Her daughter goes to a home-based day care house located only minutes from the law school, where she has the benefit of Spanish language immersion. She "responds to commands better in Spanish" than in English, laughs Dolph.

None of this came about by accident. Dolph graduated from law school in California in 2000, and was working in a big firm there. When she and her husband decided to start a family, they deliberately looked to move to a place with affordable housing and a "better lifestyle" for raising children and decided upon North Carolina. An adorable picture of her daughter appears on Dolph's computer as a screensaver. "The culture in Silicon Valley," she muses, "is work. In North Carolina, the culture is to have a balanced life."

I reach Anna Stein at home. I can hear her one-year-old daughter crying; Stein also has two sons, ages three and six. "Is this a good time to talk?" I ask. Fortunately, Stein's sister is visiting so she's able to take some time to reflect upon her life choices. After graduating from law school a decade ago, she clerked for two years at the North Carolina Court of Appeals before joining Robin Hudson's law firm where she practiced workers' compensation law. When Stein was pregnant with her first child, she and her husband moved to Washington, DC, so he could take a job on then-Senator John Edwards staff. Stein found this a "natural break" and did not work outside the home for the two years the family lived in Washington. When they returned to North Carolina, her old boss had won a seat on the

court of appeals and asked Stein if she would like to do a short-term clerkship. Stein says "I told her I was three months pregnant. I thought that would be the end of the conversation." Judge Hudson (herself the mother of two) responded: "What *could* you do?"

Stein ended up sharing a nanny, and for about six months worked five days a week from 9 until 2:30, so the nanny could leave for her other job. Stein explains how she did a full-time job in part-time hours: "I was extremely efficient. I didn't talk to anybody. I didn't have long lunches." It was a very different experience than the clerking she had done before having a child. "The difference," she says, lay in her "need for efficiency."

Since then, Stein has had no paid employment, although she has served on the board of her son's preschool for four years, including one as president, which, she says was not only "lots of work," but also put her legal training to good use as she dealt with employment and workers' compensation issues. Stein has also remained involved with the North Carolina Association of Women Attorneys, serving on its board for several years, as historian and now as chair of the Government Action Committee. This involvement, says Stein, "is critical to my still feeling part of the profession."[5]

Stein succinctly sums up the dilemma of many professional parents: "I so much want two of me." (Lisa Grafstein, a Raleigh litigator and mother of a six-year-old son, echoed these sentiments, observing that the "hardest part" of being a lawyer and mother is a desire to be "in two places at once.") Stein continues: "I want to be that person I went to law school for, yet I want to watch my children grow up in very large chunks of time." But Stein is hopeful about her professional future, believing that by networking and staying involved, when she does return to the legal workforce, "it will be easy."

When Stein does return to the paid workforce, she'll do well to keep in mind the two things that women lawyers with children seem to value most: a flexible job, and good help. A flexible job can mean anything from part time, to flex time, to a compressed work week, to job sharing. Contract law work, that is, working on a per hour or project basis, is achieving a new respectability. One recent law school graduate and mother of an adolescent who left her firm to become a contract attorney comments, "As I recently read in *Forbes Magazine*, the W-2 days are over. It's a 1099 world now." Flexibility can also mean being your own boss. Gabriela Matthews—who is 42, a single mother of a one-year-old, and solo family law practitioner—puts it bluntly: "How do I do it? I do it by working for myself!"

Good help runs the gamut from quality day care, to a caring nanny, to an involved spouse or partner. Sylvia Novinsky, assistant dean for Student Affairs at UNC Law School and also mother to 16-month-old Elena, describes herself as "really privileged" to be "equal parents" with her husband, a high school teacher. "It's not like I do everything," she says, and then adds, "I couldn't do everything!" Lisa Grafstein's domestic partner, a software engineer, started working half time when their son started preschool, and now works "half time plus." Grafstein, one of two lawyers in a two-person firm, describes her own job situation as "full time with flexibility." Even good work situations are not always easy ones. Grafstein describes her situation as "okay, but not ideal," as she believes her son, who has autism, would benefit from even more time and attention from his parents. Novinsky, as dedicated to her career as she is to her child, worries about both—that her daughter has a "long day" in day care, and that at work "people have to be able to rely on you. I don't want anyone to think I'm not cutting the mustard."

Stella Boswell sent me a thoughtful e-mail reflecting on the current state of affairs. "[T]he profession," she writes, "has made many changes and I think that it does allow fuller access to women. However, the changes are not complete enough to take into account the needs of mothers, fathers, and caregivers. In other words, women without children really have a lot of options, [but] it is when you become a mother that it gets so hard. . . [This] is where the profession and society still need fundamental changes. We still function too much like the professional person has someone at home caring for the home, family, and personal needs, and very few of us, men or women, actually have that person at home these days."

Vedia Jones-Richardson, a Durham attorney who practices copyright and trademark law, was part of the first generation of lawyer-mothers and is now part of the second. She has three sons, ages 22, 16 and 10, the oldest of whom was born the day she received her bar results in 1982. When she first became a parent there were, she says, "few road maps" for a working lawyer-mother. "I was just feeling my way along." She's used home-based day care and hired people to come to her home; she's put her husband through medical school; she's spent a lifetime, in her words, "keeping all the balls up in the air." In retrospect, she jokes, "I could have done it differently if I'd known what I was doing." But her real feelings on her life choices are summed up in four words: "I don't regret it." Sylvia Novinsky, only a little more than a year down the same road, already feels the same way. Being a mother, she says, has been "a tremendous joy." ■

Maria Mangano is the associate director for Career Services at UNC School of Law, where she graduated in 1982. She has served as the president of the North Carolina Association of Women Attorneys. She and her husband, Dan Read, also a lawyer, have a teenage son and daughter.

Endnotes

1. "Poll Finds New View of Women," *The Washington Star* (1981)
2. I found these statistics in numerous places during an online search. Although there was some variation among different sources, the variation was slight and the figures cited in this article appear to be generally accepted.
3. I realize I've made myself justifiably vulnerable to the charge that I'm writing about mothers only, and not parents generally. Given that this topic could give rise to a doctoral dissertation or a book rather than a brief article, I decided to limit my scope out of interests of economy, not philosophy. The conversation concerning the role of fathers, lawyers or not, in the upbringing of their children, is just as important as the topic addressed in this article, maybe even more so.
4. During our conversation, Boswell made reference to Miriam Peskowitz' *The Truth Behind the Mommy Wars: Who Decides What Makes a Good Mother?* in support of her belief that societal, rather than individual, change is the real solution to the issue of how to achieve a balanced career and family life. This belief that women lawyers are unfairly made to feel that balancing work and family responsibilities is a personal rather than a societal problem is also explored in Mona Harrington's 1993 book, *Women Lawyers: Rewriting the Rules*.
5. The NCAWA is instituting a new series of awards this year, the Balanced Life Workplace Awards. The solicitation for nominees notes that the "[i]ncreased participation of women in the profession has helped galvanize a consciousness regarding issues of work and life balance. . . .The profession needs sensible options in the workplace to meet family demands, encourage healthy activities outside of work, and still perform capably in our professional capacity. The need for a better balance between a lawyer's personal and professional lives is an issue for all of us."

The Best Ninety Years of My Life

By R. D. Douglas Jr.

In a recent book I wrote, entitled, "The Best Ninety Years of My Life," there is a chapter on early law practice, intended to comment on my professional life from 1936 to 1941 when I became a special agent in the FBI. This chapter was only one of 16 beginning when I was born in 1912 and running until 2004 (I am still at my office in Greensboro each day, having too much fun to quit). The book was written for my family and friends, privately printed and not published, but some of my friends at the State Bar have suggested this current article.

I am the fifth generation to practice law in Greensboro, the earliest being John M. Dick, a superior court judge from 1828 to 1846. We have had two supreme court justices, a federal district judge, one attorney general in the line. I have broken the chain, never holding public office. My son practicing here with me is the sixth generation.

I was admitted to the Bar in 1936, when I joined my father, already in his 38th year of practice. In those days, we charged $50.00 - $75.00 for examining a real estate title. If the title was fairly uncomplicated, we could do it in 2 to 3 hours, but sometimes it might take 7 or 8 hours to complete. We charged $5.00 for drawing a deed, writing wills brought $20.00 to $25.00, and a separation agreement could go up to $50.00.

I learned early that sometimes lawyers are valued by the amount of their fees. A lady came to me seeking a separation agreement from her husband. I drew a document of approximately three pages which I felt covered everything and gave her a copy to submit to her husband who had agreed to pay her bill. Later I learned that he had taken my proposal to his attorneys who had given him a 12-page document. When the wife brought it to me, I told her it was too long, but it was satisfactory and she should sign it. I gave her a bill for $50.00 which she would ask her husband to pay. In two days I had a check.

About a month later, a friend told me he had met the husband at a party and after a few drinks, the husband was talking about separating from his wife. He said his wife had gone to some "jack-leg, cut-rate lawyer named Douglas" who had only charged $50.00 for drawing a separation. The husband proudly announced that his lawyers had done the whole thing over, covering everything carefully, and charged him $750.00. He thought this was high, but he told his listeners that he knew he had an airtight separation agreement, far better than the one prepared by that cheap lawyer his wife had selected.

When a new lawyer came to town and did not have a father already practicing law, he tried to find a place with established attorneys. A lot of them started out at $50.00 or $75.00 a month. It was different with Col. Frank Hobgood, one of our leading attorneys who had numerous corporate clients. Col. Hobgood occasionally hired new lawyers with good credentials, but the attorney had to pay Col. Hobgood $75.00 a month for the first year. Col. Hobgood insisted that working with him was worth enough, so the young lawyer should pay.

At lunchtime young lawyers went to the Mayfair Cafeteria, where you could get one kind of meat, two vegetables, a piece of bread, and iced tea for $.35. Pie or chocolate cake cost $.10 more. There were always five or six of us working in the Register of Deeds Office in the courthouse, some of us made a deal with the Guilford County sheriff, who ran a jail on the 4th floor of the courthouse building and among his expenses was an allowance for buttermilk and cornbread to serve the prisoners. The sheriff always had some extra, so any of us young lawyers could go up to the 4th floor, get a huge glass of buttermilk and a big slab of cornbread, go into an open cell, and eat a tasty lunch. I enjoyed breaking up the cornbread into the buttermilk and eating it with a spoon—total cost $.15.

One of my first concerns about law practice occurred early. Some of us would sit in the courthouse and watch a trial, hoping to learn more about trial practice. One day I watched a trial without jury before Judge

Tom Shaw. I still remember at the conclusion of the evidence and the legal arguments, Judge Shaw said something like this:

> I am going to rule for the plaintiff. I don't want to. I think the defendant has been treated shamefully and I think he ought to have the case dismissed, as far as any real equity goes. However, it is my duty to rule on the law and not be swayed by personal feelings. In this case, the law is clearly with the plaintiff. Let the plaintiff's attorney draw the judgment.

I went home that evening, feeling that the law is above personal feelings. About two weeks later, I observed a similar non-jury case before Judge Hoyle Sink. At the conclusion of the evidence and arguments, Judge Sink said, "I am going to rule for the defendant. The law seems to be all on the side of the plaintiff, but he has got no business winning this case, law or no law, so I am going to rule against him."

Tom Hoyle Jr., attorney for the plaintiff, leaped to his feet and told the judge he had cited three cases directly in point, and without question, the plaintiff was entitled to the verdict. Judge Sink said, "I don't want to hear anymore about the law. My job is to dispense justice and true justice requires that I find for the defendant. If you don't like it, you can take the case down to Raleigh and see what those fellows say, Mr. Hoyle. I don't want to hear any more from you about the law."

I told my father about this case and how disturbed I was when one of our leading judges made a ruling saying he didn't care what the law said. My father laughed and said, "I know both of these judges very well and I'm not surprised. The only thing I can tell you is that if you have a case strong on the law, try to get it heard by Judge Shaw. If you're weak on the law, but have a lot of sympathetic angles to the case, try to get it on Judge Sink's calendar. You will run into a lot of this. Don't let it upset you."

I had my share of criticism from older lawyers. One extremely hot day, I had brought a coat and tie to wear in case I had to go to court, but I left my office to go to the Register of Deeds Office wearing a sports shirt. Mr. Julius Smith stopped me on the street, saying that it was completely unbecoming for lawyers to run around in sports shirts and he hoped he did not see me dressed that way again. I went on to the Register of Deeds Office, where no one cared what you wore.

Mr. Cliff Frazier stopped me on the street one day walking toward the courthouse, licking a chocolate ice cream cone. He said he was shocked. People might know I was an attorney, and I cast a bad reflection on the legal profession.

Early in my law practice my father went over a list of all the lawyers in town and made his comments. Some of them, he told me, identifying them on the list, I could trust completely and need nothing in writing. I could absolutely depend on what they said. When it came to other names on the list, he told me they were generally honest, but If I wanted a case continued, or there was some question about extending filing time, I'd better get it in writing. Such lawyers, my father said, are reasonably honest, but that they felt that in justice to the clients, they had to take advantage of any technicalities. When it came to other names, some of them, he said, must be dealt with completely at arms length. They could not be depended upon for anything. I remember one particular attorney about whom my father said,

> you may think he is not entirely honest and I agree with you, but don't hold it against him. He does not have much practice, he has a wife and four children, and I think he has a tough time. I don't think the Lord holds everybody to the same standard. Dick, you've got nobody depending on you, and you should be honest all the time, but if you ever get down and out, you might be forgiven for cutting corners if that's the only way you can earn enough to look after your family.

This last bit of advice I have thought of on many occasions.

In my first year, I had a lesson on keeping things simple. My father was out of the office when three of his good clients came to see him. They were good friends, starting a new venture, and they wanted a contract drawn. They asked me to listen to the facts and report them to my father.

Mr. A was to furnish a certain amount of capital and his duties would be such-and-such. Mr. B was going to furnish less capital, but his duties went to another direction. Mr. C, furnishing most of the capital, was to have still other duties and responsibilities. They would share profits or losses according to a specific formula.

I took careful notes and late that afternoon I reported all this to my father. I told Dad these men wanted him to draw a contract. Dad immediately asked why I did not draw it, since I had all the information, and I just told him in very clear terms what the contract should say. I told my father that I did not know how to put these facts into legal language for a legal document. I will never forget what my father told me,

> Put it down exactly as you told it to me, with the details set out one by one. You have explained it very clearly and all you need to do is write down what you told me. Don't tell me you need legal language. Too many lawyers think they have to talk like a lawyer all the time, using fancy legal terms until only a lawyer can really understand what they're saying. Don't ever use three pages if you can get it in two. Don't try to use legal terms if plain English will suffice. Don't ever think you have to write or talk like a lawyer.

I have tried to keep that advice in mind all my life.

One day in 1938, Dad and I were discussing earnings of other lawyers. We picked out one prominent Greensboro attorney and I asked my father if he thought this man made $10,000.00 a year? I knew he took his wife to New York for a week at least twice a year and he had a cottage at the beach for a month each summer. I suggested that his income must be in excess of $10,000.00.

One simple case sticks in my mind. A man came to the office stating that he had been arrested for stealing the dog of a neighbor. He said the dog was underfed and unattended, had come to his house, and after he had fed the dog the dog would not leave. He admitted he had not made any great effort to find the owner, but now he was charged with stealing the dog. Before we went before Justice of the Peace John Strickland, my father suggested the law on listing a dog for taxes. At the trial the dog's owner was not represented by an attorney but he insisted my client had stolen his dog. When it came my turn to examine the witness, I asked the owner if he had listed his dog for taxes. The law at that time said every dog must be listed individually with a two dollar dog tax. The owner refused to answer the question which he said was "stupid." Judge Strickland, knowing what I was after, ordered the witness to answer the question. The owner finally admitted that the dog was not listed

for taxes. I opened a law book and pointed out that North Carolina law said that a dog not listed for taxes is considered to be non-existent. I made my motion, pointing out that my client was charged with stealing something that did not exist. The justice of the peace, with a grin on his face, said, "Motion granted, case dismissed."

In those days when it came to fees, my father and I would consider two things: How important was the result to our clients, and what the client could afford to pay. We did not keep up with the time involved, although we would raise the fee a little if the case or the document took more than normal time. We tried to remember that even if paying a lawyer may require some sacrifice on the part of the client, this sacrifice should not be unreasonable. I remember discussing fees with a well-known Greensboro attorney who made quite a name for himself as a trial attorney. He told me that in setting a fee for a client, he initially picked an amount which he knew would make his client so mad he would never come back. This fee was not reported to the client. Thereafter, the fee was reduced enough so that the client would still think it was far too high, but he would be enough impressed with his lawyer to come back again. This attorney had a reputation for charging very high fees, but he was constantly busy for his clients.

As I recall, my father told me he would pay me $100.00 a month, but if our law practice didn't grow very much, he might have to cut back on that. That suited me fine. I was living at home with my parents out in the country, across the swinging bridge, and my expenses were very little.

One day in my early years I was charged with speeding in Winston-Salem. I had driven from Greensboro to Winston early one morning to catch a flight to Charlottesville. It was daylight and as I came into the city I saw a sign on the road saying, "Begin 35, 1,000 feet" I slowed down appropriately but I was still doing about 45 when I came to a sign marking the 35 mile per hour limit. Just inside this sign was a policeman and when I passed him, doing about 43, he gave me a ticket for speeding.

I spent all day in Charlottesville and got back to Winston-Salem about 8:30 that night, well after dark. All day I had been thinking that I had come to the 35 mile marker too soon, long before 1,000 feet. I decided to check the distance. I had a 100 foot tape in my car and I found a couple of screwdrivers and a flashlight. There was no traffic. I parked my car on the shoulder where the sign said, "Begin 35, 1000 feet." I got out, stuck a screwdriver in the ground to hold the tape and pulled it to the hundred foot marker where I put in the other screwdriver. I went back to loosen the end of the tape, walked back to attach the tape and went another 100 feet, and so on until I came to the 35 mile marker. According to my measurements, it was only 734 feet from the 1000 foot sign.

Two weeks later, when my case was called in the Winston-Salem court, I entered a plea of not guilty. The judge, whom I did not know, asked me if I had an attorney and I told him I would try to represent myself. The policeman went on the stand and testified that I was going about 44 miles an hour in the 35 mile zone early in the morning. I cross-examined him asking if he had ever measured the distance from the first sign to the second. He said of course he had not measured it; he had better things to do than go around measuring highway signs. He was sure it was 1,000 feet. I objected to his giving an opinion and the court sustained my objection. The officer finally admitted that, of his own knowledge, he did not know what the distance was, and the judge obviously could not figure what was coming up next. I took the witness stand and explained exactly how I measured the distance with my tape, screwdrivers, and flashlight. The judge asked, "You mean you actually got down on your knees and kept moving that tape from one screwdriver to another in the dark?" I said, "No, your Honor, I had a flashlight." Then I told him how I had come from Greensboro to get a flight from Winston Airport because I could not get service from Greensboro.

The judge found me not guilty and made the comment, "Mr. Douglas, I must commend you on representing yourself so well." I thanked him and left the courtroom.

Two days later a lawyer friend from Winston-Salem, whom I had not seen in the crowded courtroom, said that after I left the judge made another comment about my representing myself. My friend told the judge, "Mr. Douglas is a lawyer and so is his father." My friend said the judge felt I should have told him I was an attorney so he would not waste sympathy for someone spending an hour stretching a tape between screwdrivers in the dark and then cross-examining a policeman.

In the late 1930's, we had no district court. However, Greensboro had a municipal court under a special statute. There was only one judge, Earle Reeves. He knew that all of us called him, behind his back, by a name he had acquired in college, "Scrubby Reeves," but he did not mind. His only problem was that he loved to go hunting in the fall and fishing in the summer and there were times when his court duties interfered. If Judge Reeves decided to go fishing on a May afternoon, his secretary would call some young lawyer and ask if they would come over and be sworn in to act as judge that afternoon. The court had jurisdiction over civil and criminal matters, much like the present district court, so quite often, attorneys for the parties would go to court and find some young lawyer, temporarily sworn in only for that day, holding court. This happened often enough so that there were many younger lawyers who we referred to as "Judge" even if they had substituted only one day for Judge Reeves to go fishing or hunting. I was called on two occasions, but each time I had a conflict and declined. I was never asked again, so I was one of the few young lawyers in Greensboro who had never held court.

One of my early clients was the Western North Carolina Conference of the Pentecostal Holiness Church, an odd position for a Catholic lawyer. I later found that the conference had been confronted with a congregation in Hillsboro withdrawing from the Pentecostal faith, but wanting to take their church with them. The conference had talked to an Episcopal lawyer in Durham who quoted a fee too high; they had talked to a Methodist attorney in Burlington who did not return all their phone calls, and someone told them there was a young attorney in Greensboro who was pretty good and did not charge much. I agreed to handle the Hillsboro case and was all set for trial when I decided I wanted to interview several of the old timers in the church as to whether they had paid tithes, attended conference meetings, contributed to the conference missionary society, etc. I was told that the church members opposing the withdrawal from the conference would be attending a church service on Sunday evening from 7:30 to 8:30, and that if I came to the meeting hall

at 8:30, I could interview a handful of old timers.

I showed up at the back of the meeting hall at exactly 8:30. The acting pastor (the regular pastor had initiated the withdrawal) was still conducting the service when he looked up and saw me in the back of the hall. He waved his arms for me to come down front. Then, mentioning the trial the next day in the superior court, he said, "I want to ask Brother Douglas to lead us in prayer." I quickly remembered that the North Carolina court decisions say that if a church is congregational in structure, the ownership of church property is decided by a majority vote of the congregation. Typical of this is the Baptist church. On the other hand, other churches may be connectional, where the local church is a part of a larger body, paying dues, and working under the authority of the larger body. Typical of these are Presbyterian, Methodist, Episcopal, and Catholic.

I was not sure what kind of prayer a Catholic should make at an Evangelical Protestant congregation, but I decided that this would be ideal opportunity to talk to my witnesses. So I stepped up to the pulpit and with a hurried personal prayer to God to help me in the situation, I began a prayer:

> Oh, Lord, Thou knowest that tomorrow we must go into court to fight to preserve the church which we and our parents have loved all these years. Oh God help us in trial tomorrow.

Then I told them in the prayer that I wanted some of the old timers to tell about the old days, when they had been members of the larger Conference, had attended Conference meetings, etc. I told them to be careful on the witness stand, to speak out in a loud, clear voice so the jury could hear them distinctly. I told them they must not volunteer any information except to answer questions asked by their lawyer and if they had any uncertainty to ask that their lawyer's questions be repeated.

All of this was in the nature of a prayer, because I was asking the Lord to tell all of the people what I wanted them to know. I prayed about ten minutes, not exactly telling the witnesses what to say although I constantly added "Oh Lord, Thou knowest that what we say must be the truth." I did a pretty good job of what I was asked, leading them in prayer but at the same time telling them to think about their testimony. We won the case the next day, when the judge ruled that the Pentecostal Holiness Church is a connectional church, not congregational, and though no one could hold the members to any particular faith, they could not take the church property with them when they withdrew.

Early in my law practice, I somehow got into the field of labor relations, fighting unions, a field in which we had only three or four specialists in the state. I worked hard, studied hard, and pretty soon I was known up and down the eastern seaboard as a labor law specialist who did not charge much. Let me tell you about one of my most interesting early cases.

I was negotiating a labor contract between the tobacco company, my client, and the Tobacco Workers' Union of America. We were negotiating about a week before Christmas, offered a slight wage increase and one more paid holiday, but we refused all the other economic demands of the union. The union representative who had told me that he was also a Baptist minister asked, "Brother Douglas, if you are a Christian, how come you are so mean to us at Christmas time when you know that Jesus was a union man?"

I know my Bible fairly well, so I decided to strike back, "Reverend, I always though that Jesus was opposed to unions. He did not like your union procedures." The union representative demanded to know how I got that idea, so I told him about the parable Jesus gave about the laborers in the vineyard. He nodded his head, but I don't think he really knew what I was referring to. I pointed out that in the Scripture, the steward went out to the market place and hired people to come out to the vineyard to work to at a wage of one dinarius. The steward came back at the third hour, the sixth hour, and hired men at the same wage and again at the ninth hour, the steward saying "go into my vineyards and I will pay you one dinarius." Then I reminded the reverend that when evening had come and the steward paid all of the workers the same pay, those who had worked the whole day objected because they were paid no more than those who had worked one or three hours. The steward said he had kept his contract, and paid what he promised and no one should be angry because "the last shall be first and the first shall be last."

Then I told the reverend that the strongest single idea in the union relations is seniority but obviously Jesus did not believe in seniority in his parable. The old reverend was silent for a few minutes, then with a broad smile, he said, "what about the first strike that Jesus called in Egypt?" My reply was swift, "If you are talking about when Pharaoh took straw away from the Jewish people making bricks, they threw down their tools, and refused to work in protest." The reverend quickly said, "that is right." That

was a strike, Jesus called the first strike. I replied, "Reverend, that was 780 years before Jesus."

The reverend demanded to know how I knew the strike was that long before Jesus. Without much thought, I answered that is in 32nd Corinthians. There was a long silence and then the old man looked directly at me and with a triumphant smile, he said, "Brother Douglas, I've got you now. You are quoting 32nd Corinthians when there are only 29 chapters in Corinthians." I was nonplused for a moment but inspiration came quickly. "Reverend, haven't you ever read the 32nd Corinthians in the Dead Sea Scrolls?" There was a long silence then he said, "To be honest, I never read the Dead Sea Scrolls. I knew a shepherd boy went in a cave and found some new Bible writing, but I never knew there were three more Corinthian books in what he found." Then he said quickly, "Brother Douglas let's leave the Bible out of our discussions, I don't want to hear any more from you about the Bible." In about two hours, the union agreed to our small wage increase, the extra holiday, and we signed a two-year contract.

All attorneys are aware of the change in lawyer esteem of the public. In 1940, if I were at a party and some stranger asked me what kind of work I performed, I would say, "I am a lawyer." His reply usually was, "That's great! Do you know my lawyer, Jim Jones?" or "What kind of law do you do?" Now, if I am asked the question, and I say I am a lawyer, the answer is "Oh," then the stranger walks away.

In the 1930's lawyers were respected, liked, and their advice was sought on any problem. I can remember my father being asked to explain a biblical passage, who to vote for, where to send a son to college, and even what kind of an automobile to buy. Lawyers were assumed to be well-educated, wise, and ever-ready to help you. Now, things are entirely different. I personally have two reasons for this change: legal advertising and the idea of billable hours. I seem to be out of step on these reasons, but I have my own ideas.

Fifty years ago, I had my first supreme court appearance. The issue was whether a labor union can demand access to the employer's financial records, if the employer says he cannot afford the union demands.

Chief Justice Warren asked me what my clients were trying to hide. I told him the union had said that instead of paying higher wages, we spent too much money on advertising, especially at basketball games. The chief justice wanted to know how my client promoted his steel business by basketball. You can guess my answer: I spoke of superb basketball along Tobacco Road and said that we spoke of the company as the players lined up for a foul shot. One of the justices asked, "What is a foul shot?" and before I could answer, Justice Frankfurter cried out, "A foul shot is a free throw after the foul. Anybody ought to know that. That's where the chief justice's UCLA get so many points." I had the temerity to suggest that Carolina, Duke, State, or Wake might give UCLA a good run, then we were arguing offense and defense of the East Coast and West Coast teams. I lost the lawsuit six to three, but Justice Frankfurter wrote a strong dissent in my favor. I appeared before the court in later years but my basketball case stands out.

Sixty years ago lawyers did not seem to exhibit the personal antagonism for opposing lawyers as they do now. One lawyer recently explained, "If my client wants a rough fight, I'll see that he gets it." I chose not to answer, then I wondered, in the thirties and forties, were we in the Stone Age or was it the Garden of Eden.

I cannot explain the 65 to 70 year change in stress, discontent, and uncertainty which now seems to be a part of our profession.

I have never regretted being a lawyer. Maybe I will submit another article to the State Bar in 2012 when I hit the century mark. ■

Mr. Douglas is a life-long resident of Greensboro who, as a Boy Scout, went to both Africa and Alaska, attended Georgetown University (as did his Grandfather and father), served in the FBI during WW II, and has practiced law in Greensboro continuously since 1947.

What I've Learned (cont.)

glee in making students squirm ain't in it for me when it comes to dealing with lawyers, many of whom are former classmates and remember him all too vividly. I've been at the receiving end too many times and don't care for the weird feeling of *déjà vu*. If I know the subject matter well, I may occasionally transform my robe into a metaphorical toga, but I try hard not to make it unpleasant for one who must attempt to answer my gentle but probing queries.

Once I do rule, the lawyers (and even their clients) seem to appreciate my efforts to briefly explain the reasoning, however tortuous, behind my decision. As Mary Poppins says, "A spoonful of sugar helps the medicine go down," and the losers need to come away with a brief but polite explanation of what went wrong for them, rather than scratching their heads in bewilderment at the deafening silence emanating from the bench. Moreover, if the losing attorney has done his best with the facts and the law, I let his client know it. But I've learned I must heed the advice given to me by my judicial mentor and particular friend, now-retired superior court judge Rusty Walker, which was passed down to him by his predecessor, the late Hal Hammer Walker: "When you've laid an egg, don't cackle on the nest!" Prolixity can be a jurist's worst enemy.

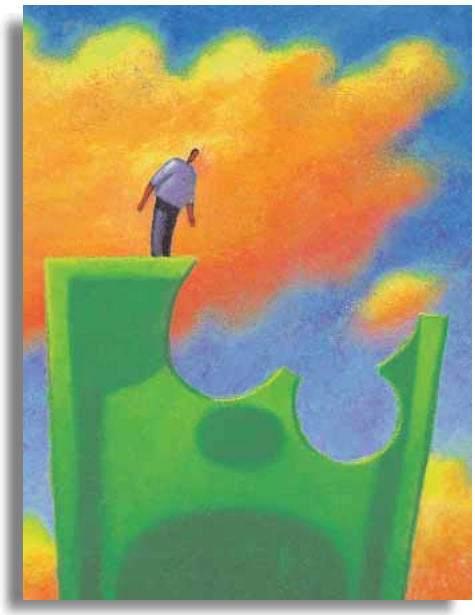
Speaking of growing prolix, I guess I could ramble on to other topics: juries, for example. But that topic deserves an entire article of its own, and in any event, is still too shrouded in fog at this point in my judicial career for me to develop any cogent thoughts. I'll conclude with the following: one of the more florid pattern jury instructions goes something like, "Somewhere within the facts of every case, the truth abides, and where truth is, justice steps in, garbed in its robes, and tips the scales." I'm usually uncomfortable uttering such hyperbole, but I've come to accept this metaphor as my particular role in our profession's communion with society at large. I love this job, and look forward to striding into superior court on Monday mornings, looking at all the expectant faces, for years to come. ■

Judge Craig is the resident superior court judge for District 18-B, Guilford County, in High Point. He practiced law with the Fisher law firm for 20 years before being appointed by Governor Easley to his current position in February 2002.

The Economic Loss Rule in North Carolina: Time to Wake the Sleeping Giant

By Gregory L. Shelton

The economic loss rule continues to seep into North Carolina's common law. Consider the court of appeals' recent decision in *Land v. Tall House Building Co.*, 602 S.E.2d 1 (N.C. App. 2004), where the court defined the economic loss rule in expansive terms. The *Tall House* decision practically invites North Carolina lawyers and courts to exercise the full potential of the economic loss rule. We should accept the invitation.



The Economic Loss Rule in 344 Words or Less

The economic loss rule is a doctrine created by the courts to police the borderland between contract law and tort law. The economic loss rule is a sound and necessary reaction to the expansion of tort law into the realm of contract law. If courts consistently observed the distinction between tort duties and contractual obligations, the economic loss rule would not be necessary. Unfortunately, the importation of tort principles into contract law and the unprincipled extension of tort liability has resulted in a "nebulous and troublesome margin between tort and contract law." *Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000).

The economic loss rule stops tort creep by focusing on the damages claimed, not the duty owed. Classic examples of losses recoverable in tort are medical expenses resulting from a slip and fall (personal injury) and the costs incurred to repair an automobile damaged in a fender bender (physical property damage). Losses not caused by personal injury or damage to other property (property that is not the subject of the contract) are economic losses, and economic losses fall within the realm of contract law. The economic loss rule prevents recovery of economic losses in tort even where the court stretches the duty to exercise due care beyond its doctrinal limits. If the plaintiff seeks recovery of economic loss, and if an exception to the economic loss rule does not apply, the plaintiff must look to contract law for recovery.

The economic loss rule also prevents parties from walking away from their contractual obligations. If the law permitted a party to shirk its contractual duties and undermine the agreed upon allocation of risks by clothing its claim in negligence, (all together now) "con-

tract law would drown in a sea of tort." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986). The economic loss rule thus reinforces the distinction between contract law, which is designed to enforce the expectancy interests of parties to an agreement, and tort law, which is designed to encourage citizens to avoid causing harm to others.

Ode to a Shapeless but Sensible Doctrine

While the concepts that underpin the economic loss rule are easily stated, the economic loss rule does not lend itself to simple application or definition. Indeed, lawyers and judges often resemble the English Romantic poets in their musings dedicated to capturing the essence of the rule. One commentator observed that "judges, lawyers, and commercial clients alike are desperately struggling to define the parameters of the economic loss rule." Paul J. Schweip, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 Fla. B. J. 34 (Nov. 1995). "Commentators and critics have used vivid metaphors when they have analyzed the impact and import of the multifaceted, seemingly inconsistent and ever changing doctrine known as the 'economic loss rule[.]'" F. Malcolm Cunningham Jr. & Amy L. Fischer, *The Economic Loss Rule: Deconstructing the Mixed Metaphor in Construction Cases*, 33 Tort & Ins. L. J. 147 (1997). Such criticism overlooks the fact that a certain amount of ambiguity (that is, agility) is necessary for the economic loss rule to effectively weed the garden of contract.

The economic loss rule is both misunderstood and underestimated. To some, the economic loss rule simply means that parties to a contract cannot sue one another in tort in the absence of a tort independent of the contract. Bruner and O'Connor accurately refer to this rule as the "contract constraint" limitation on tort damages. Philip L. Bruner & Patrick J. O'Connor Jr., *Bruner & O'Connor on Construction Law* § 19:9 (2002). The economic loss rule is an entirely different animal. The contract constraint limitation leaves open the possibility of tort claims by outsiders to the contract for purely economic losses. The economic loss rule bars such claims.

Another source of confusion surrounding the economic loss rule stems from the failure of courts to address the distinction between duty and damages when discussing the rule. Courts frequently open their discussion of the economic loss rule in terms of duty (just as this article does), but then, without warning, turn to the nature of the damages. In analyzing economic loss rule opinions, insert the following sentence before the court addresses the nature of the damages: "In the past, we so ignored and muddled the distinction between the duty imposed upon everyone to exercise due care to protect others from harm, and the obligations created by an exchange of promises made in contract, that we must now look to the damages claimed by the plaintiff before we decide whether the defendant breached a duty to society, or a contractual obligation, or neither."

An example of how some courts eagerly disregard the distinction between contract and tort is found in a 1989 case from south of the border. In *Kennedy v. Carolina Lumber & Manufacturing Co., Inc.*, 384 S.E.2d 730 (S.C. 1989), the South Carolina Supreme Court went out of its way to overrule the unrelated but well-reasoned decision of the Court of Appeals of South Carolina in *Carolina Winds Owners' Association, Inc. v. Joe Harden Builder, Inc.*, 374 S.E.2d 897 (S.C. App. 1988).

In *Carolina Winds*, a condominium association representing individual condominium unit owners asserted negligent construction claims against the general contractor and the masonry subcontractor. Neither the association nor the unit owners shared privity with the contractors. The court of appeals properly held that the economic loss rule barred the negligence claims because the owners did not suffer personal injury or damage to other property. Apparently troubled by *Carolina Winds*, the *Kennedy* court overruled the decision, announcing that "we once again join those states which strive to protect the modern new home buyer." *Id.* at 737. For a thorough analysis of the *Carolina Winds* and *Kennedy* decisions, *see* Luther P. House Jr. & Hubert J. Bell, *The Economic Loss Rule: A Fair Balancing of Interests*, 11 Constr. Law. 1 (Apr. 1991).

History of North Carolina's Economic Loss Rule, Part I: A Question of Duty

Shadows of the economic loss rule first appeared in North Carolina jurisprudence in *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 240 S.E.2d 345 (N.C. 1978). In that case, the North Carolina State Ports Authority ("Ports Authority"), as owner, entered a contract with Dickerson, Inc. ("Dickerson"), as general contractor, to construct a transit building and a warehouse at Ports Authority's facility in Carteret County. The roofs of the buildings leaked. Ports Authority asserted a negligence claim against Dickerson and Dickerson's roofing subcontractor, E.L. Scott Roofing Company ("Scott"), to recover the cost of repair.

The Supreme Court of North Carolina rejected Ports Authority's negligence claim, holding that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Id.* at 350. The court acknowledged case law holding a party to a contract liable in tort for "personal injury or damage to property" resulting from the promisor's "negligent, or wilful, act or omission in the course of his performance of his contract." *Id.* (citations omitted). "Such decisions," observed the court, "appear to fall into one of four general categories" that did not apply to the circumstances in *Ports Authority*:

Personal injury or property damage to an outsider. The first general exception under *Ports Authority* arises where "[t]he injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee[.]" *Id.* As support for this exception, the supreme court cited its earlier decision in *Council v. Dickerson's, Inc.*, 64 S.E.2d 551 (N.C. 1951). *Council* deserves a closer look not only because the decision deftly illustrates the first *Ports Authority* exception, but also because *Council* superbly captures the oil and water relationship between contract and tort.

Mrs. T.C. Council ("Council") brought a negligence action against a highway contractor, Dickerson's, Inc. ("Dickerson"), after suffering personal injury and property damage in an automobile accident. Council alleged that Dickerson failed to provide flagmen and warning signs as required by a contract between Dickerson and the State Highway and Public Works Commission (the "Commission"). The contract provided that "[t]he contractor shall place and maintain such signs, danger lights, and furnish watchmen and flagmen to direct traffic as in the opinion of the engineer may be deemed necessary." *Id.* at 552. Council further alleged that Dickerson's failure to comply with this contractual requirement caused Council's injuries and property damage. *Id.* Dickerson

moved to strike a portion of the complaint alleging the existence of the contract and portions of the contract referring to Dickerson's contractual duty to provide flagmen and signage. Dickerson correctly argued that Dickerson's duty of care should not be pulled from promises in a contract. The trial court denied Dickerson's motion to strike.

The Supreme Court of North Carolina affirmed the trial court's decision not to strike the allegation that Dickerson contracted with the Commission to perform the work. "Although the plaintiff sues in tort and not in contract, the contract between the defendant and [the Commission] created the state of things which furnished the occasion for the tort[.]" *Id*. The fact that Dickerson performed the work pursuant to the contract did not relieve Dickerson of "the positive legal duty devolved upon him to exercise ordinary care for the safety of the general public traveling over the road on which he was working." *Id*. at 553. And so, the first *Ports Authority* exception: The duty imposed by law to exercise due care to prevent damage to the person or property of others applies even to actions undertaken in performance of a contract.

But *Council* has more to teach. The supreme court found error in the trial court's refusal to strike the averments setting forth Dickerson's contractual obligation to provide signage and flagmen. The allegations "aver a breach of a contractual obligation," observed the court, "and not a violation of a duty imposed by law." *Id*. at 553-54. The court noted that "[a]n omission to perform a contract obligation is never a tort, however, unless that omission is also the omission of a legal duty." *Id*. at 553 (citations omitted). The supreme court reversed and remanded the case based upon this error.

The *Ports Authority* court also cited *Pinnix v. Toomey*, 87 S.E.2d 893 (N.C. 1955) as support for this first exception. As in *Council*, the issue in *Pinnix* was whether references to a contract should be stricken from a negligence claim. Unfortunately, the *Pinnix* decision contains language that, taken out of context, lends credence to the oxymoronic claim of "negligent breach." In the midst of a free-wheeling exposition of tort law, the supreme court stated that the duty of care in tort "may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, that a negligent performance constitutes a tort as well as a breach of contract." 87 S.E.2d at 898. The court went on to clarify that the contract "merely creates the state of things which furnishes the occasion of the tort" and are not relevant to the standard of care in negligence. *Id*.

In its unpublished opinion in *Nudelman v. J.A. Booe Building Contractor, Inc.*, No. COA02-267, 2003 WL 722190 (N.C. App. March 4, 2003), *cert. denied*, 357 N.C. 165, 580 S.E.2d 371 (May 1, 2003)., the court of appeals rejected a "negligent breach" claim asserted by homeowners in a construction defect case. The homeowners based their argument on the out-of-context language in *Pinnix*. The court of appeals concisely held that "a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if the failure to properly perform was due to the negligent or intentional conduct of that party." *Nudelman*, 2003 WL 722190 at **5.

Personal injury to the promisee or damage to "other property" of the promisee. The second general exception in *Ports Authority* arises where "[t]he injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee[.]" *Ports Authority*, 240 S.E.2d at 350. The duty to exercise due care runs to members of society, even those members in privity. If a roofer fails to secure his hammer, and the hammer injures the homeowner who hired him, the homeowner may sue in negligence. Similarly, the homeowner may sue the roofer in negligence if the hammer falls on "other property" such as the homeowner's car. However, if the hammer punctures the roof, the homeowner must sue in contract.

The meaning of "other property" frequently poses difficult factual questions for courts. Consider the facts in *Wilson v. Dryvit Systems, Inc.*, 206 F.Supp.2d 749 (E.D.N.C. 2002), where the Wilsons contracted with a general contractor, NCW Development, Inc. ("NCW"), to construct their home. NCW subcontracted with D.T. Glosson Construction, Inc. ("Glosson") to install the exterior cladding. Glosson applied the Direct-Applied Exterior Finish System ("DEFS") exterior cladding system manufactured by Dryvit Systems, Inc. ("Dryvit").

Five years after construction, the Wilsons filed suit against Dryvit alleging that the DEFS cladding failed, resulting in "widespread and extensive moisture intrusion behind the faces of the house, probable deterioration of the sheathing, and rotting of framing members, doors, windows, and subflooring." *Wilson*, 206 F.Supp.2d at 753. Sharing no privity with Dryvit, the Wilsons asserted negligence, gross negligence, negligent misrepresentation, fraud, and unfair or deceptive trade practices. Dryvit moved for summary judgment based upon the economic loss rule.

The court addressed whether the water intrusion, sheathing deterioration, and rotting constituted "other" property damage for purposes of the economic loss rule. *Wilson*, 206 F.Supp.2d at 753. The court, citing three North Carolina state court cases, concluded that "when a component part of a product or system injures the rest of the product or system, only economic loss has occurred." *Id*. (citing *Moore v. Coachmen Indus., Inc.*, 499 S.E.2d 772 (N.C. 1998); *Gregory v. Atrium Door & Window Co.*, 415 S.E.2d 574 (N.C. App. 1992); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 391 S.E.2d 211 (N.C. App. 1990)). In the context of construction defects, the *Wilson* court held that only economic loss occurs even if the defect at issue causes damage to other parts of the structure. *Id*. (citations omitted). The DEFS cladding, observed the court, constituted an integral component of plaintiffs' house. The *Wilson* court concluded that the damage caused by the allegedly defective DEFS constituted damage to the house itself. Based upon the lack of "other" property damage, the court granted Dryvit's motion for summary judgment. Judge Britt's analysis in *Wilson* conforms to the majority of courts facing the same issue. *See, e.g., Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000); *Calloway v. City of Reno*, 993 P.2d 1259 (Nev. 2000).

The Middle District recently refined the meaning of "other property" in *Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, No. 1:03CV949, 2005 WL 1610653 (M.D.N.C. July 8, 2005). In that case, the plaintiff, Indemnity Insurance Company of North America ("IICNA"), asserted multiple claims after the crash of a helicopter owned by its insured, Duke University Medical Center. Among many other issues, the court considered whether IICNA could assert a negligence claim against American Eurocopter LLC ("American Eurocopter"), the entity that allegedly installed an oil

pump with a pump driver gear that did not meet production specifications during its overhaul of the main gearbox. American Eurocopter argued that the economic loss rule precluded recovery in tort because the helicopter was the subject of the contract. IICNA argued that the gearbox was the subject of the contract and that the rest of the helicopter constituted "other property."

After an extensive discussion of the state of the economic loss rule in North Carolina, the court concluded that "for purposes of the economic loss doctrine, as to the negligence claims against American Eurocopter, the 'product itself' was the gearbox, and the helicopter was 'other property[.]'" *Id*. at *16. To support its holding, the court analogized the replacement parts in the gearbox to a light bulb installed in a home: "[I]f the light bulb were negligently manufactured and as a result exploded, causing a fire that destroyed the user's home in which it was installed, the economic loss rule would not preclude the homeowner from pursing a negligence claim against the light bulb manufacturer for damage to his home." *Id*. at *14.

Bailments, etc. The third exception arises where "[t]he injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper, or other bailee." *Ports Authority*, 240 S.E.2d at 350-51. This exception developed in Elizabethan England, where the courts permitted negligence suits against gratuitous bailees to avoid the requirement of consideration in contract. J.H. Baker, *An Introduction to English Legal History* at 446-47 (Butterworths 1990).

Conversion. The fourth exception includes cases where "[t]he injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the promise, by the promisor." *Ports Authority*, 240 S.E.2d at 351.

Ports Authority puts to rest the idea that the economic loss rule and the contract constraint limitation are synonymous. Recall that Ports Authority also asserted a negligence claim against Scott, the roofing subcontractor with whom Ports Authority shared no privity. The Supreme Court of North Carolina upheld the dismissal of this claim, explaining that Ports Authority's allegation that Scott negligently installed the roofs was "simply an allegation that Scott did not properly perform its contract with Dickerson and, for the reasons above set forth [in the supreme court's discussion of Ports Authority's negligence claim against Dickerson], does not allege a cause of action in tort in favor of [Ports Authority] against Scott." *Id*. at 353.

The Middle District rejected an attempt to masquerade the contract constraint limitation as the economic loss rule. In *Higginbotham v. Dryvit*, Inc., No. 1:01CV00424, 2003 WL 1528483, 50 U.C.C.Rep.Serv.2d 128 (W.D.N.C. March 20, 2003), the Higginbothams sued Dryvit in negligence for the alleged failure of the DEFS cladding system. The Higginbothams argued that the economic loss rule did not apply because the parties lacked privity. The court rejected the argument, citing as controlling precedent *Gregory v. Atrium Door and Window Co.*, 415 S.E.2d 574 (N.C. App. 1992), where the court of appeals rejected a homeowner's implied warranty claims against a door manufacturer because the parties lacked privity. The economic loss rule applies without regard to privity.

History of North Carolina's Economic Loss Rule, Part II: A Question of Damages (or, alternatively, Will the Real Economic Loss Rule Please Stand Up?)

North Carolina recognizes the true economic loss rule. In *Moore v. Coachmen Industries, Inc.*, 499 S.E.2d 772 (N.C. App. 1998), flames engulfed a recreational vehicle (the "RV") as the RV was being driven by friends of the owners. The fire destroyed the RV but caused no personal injuries. The owners of the RV, the Moores, sued the manufacturer of the RV, Coachmen Industries, Inc. ("Coachmen"), Coachmen's subsidiary, Sportscoach Corporation of America ("Sportscoach"), and MagneTek, Inc. ("MagneTek"), the supplier of the RV's electrical system. The Moores alleged negligence and breach of implied and express warranties against Coachmen and Sportscoach, and negligence and breach of the implied warranty of merchantability against MagneTek.

The court of appeals held that the economic loss rule barred the Moores' negligence claims. "North Carolina has adopted the economic loss rule," declared the court, "which prohibits recovery for economic loss in tort." *Id*. at 780. The court, citing *Ports Authority*, further stated that "such claims are governed by contract law-in this case, the UCC." *Id*. The court concluded that permitting the Moores to sue the defendants in negligence "would permit the party to ignore and avoid the rights and remedies granted or imposed by the parties' contract." *Id*. (citing *Reece v. Homette Corp.*, 429 S.E.2d 768 (N.C. App. 1993)).

The latest pronouncement of the economic loss rule by a North Carolina court is *Land v. Tall House Building Co.*, 602 S.E.2d 1 (N.C App. 2004). In *Tall House*, the Lands hired Tall House Builders, Inc. ("Tall House") to construct their house. Tall House's stucco subcontractor, Southern Synthetic, installed the DEFS system manufactured by Dryvit. The Lands sued Tall House for negligent construction, alleging failure of the DEFS system. Tall House, in turn, filed a third-party complaint against Dryvit and the installer, Southern Synthetic. Tall House settled with the Lands for $199,900.00. As part of the settlement agreement, the Lands assigned "all claims, rights and causes of action they may have against any other person or entity concerning and damage to the house" to Tall House's insurer, Assurance Company of America ("ACA"). ACA, standing in the shoes of Tall House, sued Dryvit for contribution and indemnity. The trial court granted summary judgment in favor of Dryvit and against ACA on both claims.

The court of appeals, citing the rule that a breach of contract does not give rise to a tort action, rejected ACA's contribution and indemnity claims. "Since there can be no recovery based on a negligence theory," reasoned the court, "ACA's contribution claim must also fail." 602 S.E.2d at 3 (citations omitted). The court presented two distinct and independent reasons for upholding summary judgment against ACA.

As its first reason, the court of appeals echoed the *Ports Authority* rule that *"the law of contract, not the law of torts, defines the obligations and remedies of the parties."* *Id.* at 4 (emphasis in original). Nothing new here. However, as its second reason, the court subjected ACA's claim to the damages-based economic loss rule. "Second," began the court, "the economic loss rule 'prohibits recovery for *economic loss* in tort.'" *Id*. (emphasis added) (citing *Moore v. Coachmen Industries, Inc.*, 499 S.E.2d 772, 780 (N.C. App. 1988)). The court cited the Eastern District's decision in

Wilson to support its conclusion that the DEFS was a component of the house and that no damage to "other property" was present. *Id*. (The Court of Appeals of North Carolina reached the same conclusion in its unpublished decision in *Nudelman v. J.A. Booe Building Contractor, Inc.*, No. COA02-267, 2003 WL 722190 (N.C. App. March 4, 2003), cert. denied, 357 N.C. 165, 580 S.E.2d 371 (May 1, 2003)).

Tall House illustrates the continued acceptance and approval of the economic loss rule in North Carolina. The supreme court and the court of appeals should continue to employ the economic loss rule in all civil cases, subject to a handful of exceptions.

But What About . . . ? Existing and Proposed Exceptions to the Rule

1. Fraud in the Inducement

North Carolina should carve out an exception for fraud in the inducement. Fraud in the inducement, which normally occurs before the parties contract, is a tort independent of a contractual breach. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238, 1239 (Fla. 1996). "Fraud in the inducement presents a special situation where the parties to a contract appear to negotiate freely—which normally would constitute grounds for invoking the economic loss doctrine—but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior[.]" *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 532 N.W.2d 541, 545 (Mich. App. 1995).

Unlike fraud in the inducement claims, the economic loss rule should bar common law fraud claims relating to the performance of a contract. However, as a practical matter, the economic loss rule will affect the form but not the substance of fraud claims in North Carolina. The economic loss rule poses no obstacle to fraud claims brought under our expansive Unfair or Deceptive Trade Practices Act, codified at Chapter 75-1.1 *et seq*. of the North Carolina General Statutes.

2. Malpractice

Malpractice is a creature of both tort and contract. *Handex of Carolinas, Inc. v. County of Haywood*, 607 S.E.2d 25 (N.C. App. 2005); *United Leasing Corp. v. Miller*, 298 S.E.2d 409 (N.C. App. 1982); *Chicago Title Ins. Co. v. Holt*, 244 S.E.2d 177 (N.C. 1978). The law has long imposed a duty upon professionals to act within the applicable standard of care of their profession. North Carolina courts should make clear that malpractice claims survive the economic loss rule. Otherwise, North Carolina will experience the judicial chaos and backsliding that occurred in Florida. *See, e.g., Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999) (receding from perfectly good economic loss rule opinions due to confusion over application of economic loss rule to malpractice actions).

The malpractice exception dovetails nicely with the "supervisory architect" doctrine recognized in *Shoffner Industries, Inc. v. W.B. Lloyd Const. Co.*, 257 S.E.2d 50 (N.C. 1979). The supervisory architect doctrine relates to the tort liability concept of foreseeability; it is not a true exception to the economic loss rule. Under this doctrine, architects may be liable to participants on a construction project even where there is no privity. The *Shoffner* court observed that an architect possesses the "power of economic life or death" over a contractor. *Id*. at 55 (quoting *United States v. Rogers*, 161 F.Supp. 132, 136 (S.D. Cal. 1958)). The court then held that an architect has a duty of care to the contractor, even where there is no privity. With *Shoffner*, North Carolina joined other jurisdictions that recognize the doctrine. *See, e.g., A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973).

The Middle District recently addressed the supervisory architect doctrine in *Ellis-Don Construction, Inc. v. HKS, Inc.*, 353 F.Supp.2d 603 (M.D.N.C. 2004). Ellis-Don Construction, Inc. ("Ellis-Don") served as general contractor for the construction of a hospital project. The defendants constituted the design team for the project. Ellis-Don alleged that the defendants performed their duties negligently and in bad faith. One of the defendants, Corley Redfoot Zack, Inc. ("CRZ"), argued that dismissal was required under the economic loss rule. To support its argument, CRZ cited the expansive language contained in *Tall House*.

The Middle District refused to apply the economic loss rule, citing *Davidson*. The court should have stopped there. But alas, it did not. In dicta, the court stated that the economic loss rule applied to products liability cases, but not to other cases. "North Carolina's economic loss rule bars claims in tort for purely economic losses in the sale of goods covered by contract law, including the UCC." 353 F.Supp.2d at 606. North Carolina courts should ignore this dicta and continue to extend the reach of the economic loss rule.

3. Section 552 of the Restatement of Torts

A related exception comes from Section 552 of the Restatement of Torts, which imposes liability upon one who, in his business or profession, negligently supplies information for the guidance of others. The supreme court recognized Section 552 in *Davidson & Jones, Inc. v. County of New Hanover*, 255 S.E.2d 580 (N.C. App. 1979). In that case, a general contractor and its subcontractors sued the owner's architect for economic damages resulting from an allegedly defective soil investigative report prepared by the architect's consultants. The supreme court held that the general contractor and its subcontractors stated a claim in negligence against the architect, with whom they shared no privity, by alleging that the architect negligently misrepresented the subsurface soil conditions and that the contractors' reliance upon the report proximately caused their injury.

4. Breach of Fiduciary Duty

Finally, the economic loss rule should not trump the special duty that the law imposes upon fiduciaries. *See* Amanda K. Esquibel, *The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter Than the Morals of the Marketplace?*, 42 Vill. L. Rev. 789 (1997).

Bringing It All Back Home

The economic loss rule serves the important function of preserving the expectancy interests of contracting parties while at the same time allowing claims in negligence where there is injury to person or other property. North Carolina courts have developed a solid foundation upon which to broadly apply the economic loss rule beyond the realm of products liability and the sale of goods. Based upon the expansive language in *Tall House*, the court of appeals appears willing to exercise the full potential of the economic loss rule. Subject to the existing and recommended exceptions listed in this article, consistent application of the economic loss rule in all civil cases will maintain balance and order in the common law of this state. ■

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Where Value Resides

BY TERRY S. ORNDORFF

"Not guilty!" The words resonated through the courtroom hitting Grace in a numbing wave. "No reaction," She commanded herself, "no reaction . . . don't give him the satisfaction." She scribbled spirals on her notepad as the judge excused the jury for the day. Behind her, she heard a little girl whisper, "Mommy, what does that mean?" The sound of quiet sobbing was the only response.

The Results Are In!

In 2005 the Publications Committee of the State Bar sponsored its Third Annual Fiction Writing Competition. Seven submissions were received and judged by a panel of five committee members. The two stories that tied for first place follow.

Grace looked up from the notepad to see the defendant turning in her direction. Their eyes met like a head-on collision. The hint of a crooked smile and one raised eyebrow said, "you lose again."

Neil Watson's confidence had been evident throughout the trial. He was well aware that the state had no other witnesses, no physical evidence, and no DNA, . . . just the "fantasies" of a little girl.

The incidents had occurred the previous summer. The Battle family had just moved to town and Watson, the ever-helpful neighbor, convinced Mrs. Battle that Lisa should learn to swim before she started forth grade. Watson had an uncanny ability to foster trust, not only in children, but also their families as well. Lisa's parents had no reason to suspect that in addition to giving their daughter swimming lessons, Watson had seized this opportunity to groom their child to perform sexual acts with him, acts that would be unfamiliar to most adults.

It was the second time that Grace Steelman had prosecuted him for such a crime. It was also the second time she'd lost.

"Can we appeal?" Tear tracks glistened from Mrs. Battle's swollen cheeks.

"No, we're not allowed to appeal the jury's verdict." Grace said.

"What about the threats he made to Lisa? Can't you at least ask the judge to order that he stay away from her? He lives just three houses away."

"I'm sorry, but now that he's been acquitted, the judge no longer has the authority to put conditions on him."

Grace looked down at the little girl whose face was now buried in her mother's skirt.

"Lisa, I want you to know that I'm very proud of you," Grace said. "You were very brave. And remember, we said that if each of us did the best that we can to let the jury know the truth, then we would be proud of ourselves, no matter what happens. You did a wonderful job."

Lisa's deep brown eyes looked up at Grace. "But why didn't they believe me?"

"We don't know that they didn't believe you, sweetie, it's just very hard for some people to send a man to jail for a long time. We tried our best, it just wasn't enough." Grace said.

"I just don't understand!" Lisa cried as her face returned to the security of her mother.

Grace watched Watson pat his attorney on the back as they exited the courtroom. "Neither do I," she said to herself.

Watson had hired Glenn Mitchell, one of the most seasoned defense attorneys in the district. Not least among Glenn's trial skills was his ability to establish a comfortable rapport with the jury. Glenn came across like a "good ol' country boy," which, Grace had to admit to herself, he probably was. But

whether authentic or not, it played well in this county.

But Grace had often considered that her biggest adversary was not present in the courtroom. Her most formidable opponent was scattered throughout the quiet homes of her community. Television, or more accurately, crime drama television, poisoned the minds of her prospective jurors each night. It created unrealistic expectations, as well as lazy jurors. No longer did these citizens come to the courthouse ready to scrutinize each witness for their veracity. No longer did they list forward in their chairs striving to capture every expression, every inflection, and every nuance. Such scrutiny was of another generation. For now they arrived like patrons attending the premiere of the latest science fiction movie. They expected to be entertained by dazzling computer animations and high-tech lab result presentations that would make their decision effortless. Grace couldn't provide that. Her small office didn't have the resources of a television studio.

As Grace gathered up her files, she questioned what could she have done differently. With the lack of physical evidence the odds of winning this case were about one in three. Glenn had offered to plead Watson guilty to a lesser offense. The Battle family trusted her judgment and it would have been a quick and easy disposition of the case with a guaranteed conviction. But with that plea he would probably receive probation and immediately be back out on the street among children. She had gambled and lost, but still, it was the right decision.

Watson was like a drug resistant virus. Grace couldn't help but wonder how many children he would irreparably scar before he could be finally stopped.

* * *

As she approached the District Attorney's Office she spotted Frank Rogers' round figure rolling down the hall. Grace felt like the last pin in an oversized bowling alley. She began to turn around, but it was too late.

"How'd it go this morning?" He was grinning like he'd just witnessed a fatal accident.

"Fine." she lied as she hurried on; "I'm late for an appointment."

He knew, she thought, verdicts travel through a courthouse in nanoseconds. Although Frank had been with the District Attorney's Office for many years, he always seemed to take morbid pleasure in the failures of his coworkers.

"I'd like to hear all about it," Frank called after her.

Frank was the worst kind of prosecutor. He was there solely for the power. There may have been a time when he had a passion for justice, Grace thought, but if so, that flame had been extinguished long ago.

* * *

"Sexy shoes, expensive?" the new receptionist said as Grace entered the office.

"Thank you, Susie." Grace smiled then frowned slightly. "I splurged a bit for this trial. Guess they're not very lucky though."

"They'd be lucky if I had a pair." Susie giggled.

Grace smiled again. "Not exactly the kind of 'lucky' I'm looking for."

"Hey, don't forget your messages." Susie pointed to an interoffice mailbox.

"Anything urgent?"

"Nope, just a couple CLE brochures and some jail-mail from an inmate who's unhappy with his 'quarter pointed attorney'."

Grace retrieved the contents of the box.

"Oh, and a boy named Charlie keeps calling to remind you about his party tomorrow night." Susie said.

"I thought it was next Saturday. Are you sure he said tomorrow?"

"Five times . . .once each time he called." Susie laughed. "He kept calling to see if you'd gotten his message yet. Seemed like a sweet boy though. Is he family?"

"Not exactly. He was a victim of severe physical abuse in a case I tried a couple years ago. His new family has a small 'get together' every year to celebrate the anniversary of his adoption."

* * *

The umbrella did little to protect Grace from the sideways rain outside the courthouse. As she hurried across the street to the coffee shop, one foot plunged deeply into a muddy cavity in the pavement. When her foot came out of the hole her new suede slingback shoe had vanished. Balancing on the other foot, she reached down and grabbed the top of the wayward shoe. After some effort, the puddle reluctantly released its prize and Grace hurried on.

Grace welcomed the warm home-like scent as she entered the shop. She hobbled toward the counter, trying to ignore the alternating wet squishing sound her left shoe made on the old hardwood floor.

"Let me buy you lunch," said a voice beside her.

Grace hadn't noticed Glenn Mitchell standing to her left as she approached the counter.

"Thank you, but I always pay my own way," Grace said, forcing a smile as she fished crumpled dollar bills from her purse.

"Holding a grudge are you?" Glenn asked, knowing the answer.

"Of course not, Glenn. You are supposed to zealously represent your client, I just wish you didn't do it so well."

Glenn smiled "Thank you. These cases are always difficult for both sides."

"That's true," she said, "but if you lose, the worst that can happen is that a pedophile goes to prison. I have to live with knowing this man is out among children because I couldn't convict him." Grace felt her cheeks beginning to flush. "Because I failed, more children will suffer."

"Hey, that's not fair," Glenn said, "I can lose a trial and allow an innocent man to be convicted. Okay, maybe not in this last case, but it can happen. And I'm sure you'll agree that an innocent man going to prison is far more of an injustice than a guilty man going free?"

Grace started to speak but stopped herself. She gave a slight nod and she reached for the paper menu on the counter.

"Anyway, you did a fine job with a difficult case. You should be proud of yourself," he said.

"Thanks," she said softly as she turned from the counter.

Grace laid the menu down on a table and walked slowly to the large picture window by the front door. She gazed across the street to the ominous brick building, now darkened by the rain. Glenn's right, she thought as she recalled the many late nights she spent preparing this case for trial. She *should* receive some satisfaction in knowing she did the best job she could. She should, but she didn't.

What good is it to put your heart and soul into a case that you lose, Grace reasoned, the end result is the same as if you didn't care to begin with. No . . . it was much worse.

"Maybe you'll get me next time," Glenn said, as he walked out into the weather.

Glenn was always a gentleman, and gra-

cious whether he won or lost. She hated that he'd caught her in such a discouraged mood. It was so unlike her to expose her emotions to others. She always endeavored to appear independent and in control, regardless of the situation. Although she was usually successful in this regard, she knew now that she was more unsure of herself than ever before.

As Grace opened her purse to replace the paper money, her eyes focused on an old laminated photo tucked inside. It was difficult for her to accept that five years had passed since graduation. She felt a subtle ache as she smiled back at the two grinning faces in the picture. Logan Scott had been her trial partner and best friend throughout law school. During their third year he'd begged her to join him in starting their own practice. But after she declined for the hundredth time Logan accepted a position in the legal department of a large software company.

Grace looked into the eyes of her younger self. It was a time of unwavering confidence. She was a strong young woman determined to change the world, or at least her part of it.

Grace found herself once again looking toward the courthouse. Am I destined to end up like Frank . . .beaten down and bitter?

* * *

"Okay . . . what's wrong, Peanut?" Logan asked as he walked Grace into his office.

Her mother had called her "Peanut" since she was a baby. Logan had found out about the nickname during their first year of law school. Originally he'd used it to tease her, but over the years it had become a term of endearment.

"Everything's fine, why?" Grace responded.

Logan said nothing; he just studied her eyes.

"I think it may be time for a change, Logan." She said finally.

"What's happened?" Logan motioned Grace toward the Queen Anne sofa.

"Nothing specific. I just think it might be time to try something new."

"Well, you *know* how I feel . . . " Logan began, as he sat down beside her.

"I know" Grace interrupted, "you think I'm being taken advantage of."

"Grace, the system is *designed* to take advantage of you. The public doesn't want to pay for a quality justice system, only the appearance of one. It's willful blindness. They refuse to consider what kind of justice results from overloaded court calendars and overworked court personnel. And how long have you been dealing with these child abuse cases now?"

"For the last three years," she said.

"And in what percentage of these cases do you feel satisfied with the outcome?" Logan asked.

"Do you mean trials?"

"Trials or pleas. When all is said and done, how many cases do you walk away from *fully* satisfied with the result?"

"That's hard to say, plea offers are usually a compromise between what I want, and what I can prove." Grace said.

Logan leaned forward in his chair. "Then by your own definition, most pleas result in something less than what you feel is appropriate for the crime. That tells me that to really get a result that you are truly satisfied with, you usually have to go to trial, obtain a guilty verdict, *and* survive the appeal process, correct?" Logan said.

"I hadn't really thought of it that way, but I guess that's true." Grace said.

"Grace, if my investments furnished similar results to what you are getting, I would jump out that window, and take my brokers with me."

"I feel *much* better about my situation now, thanks." Grace smiled weakly.

"I'm not trying to make you feel bad, I just want you to see things clearly. You have admirable intentions and you're a hard worker, but the payoff just isn't there, *and it never will be*. You need a position that rewards you for your effort."

"Like that last job posting you e-mailed?" She asked.

"Exactly. I wish you'd consider it."

"I am considering it," Grace smiled, "That's why I came to see you. I hope it's not too late."

"No, we've completed the interviews but a final decision won't be made until next week.

If you're serious then you need to accompany me to the banquet tomorrow tonight. We're celebrating the release of a new product line. It would be an excellent opportunity for you to meet the people who'll be making the hiring decisions."

"What time?"

"A limousine is going to pick us up here at eight o'clock so meet me here just before, unless you 'chicken out' of course," Scott winked at her.

"I'll be here," she said as she walked toward the door.

"Peanut, I think you're making a smart move."

Grace paused in the doorway. "I hope so."

* * *

"Ms. Grace is here! Ms. Grace is here!" a little boy's voice squealed as Grace approached the small ranch home. The front door burst open and a chubby seven-year-old boy came running down the walk toward her.

"Hey Charlie," Grace said. "I'm sorry I'm late."

"I thought you weren't coming. I missed you," he said wrapping his arms around her.

"I've missed you too. I wish I could stay for your party, but I have a very important meeting tonight."

"I want to show you something," he said, and before she could respond, he'd disappeared back into the house.

Almost two years had passed since Grace had met Charlie in the District Attorney's Office. He had been the victim of severe physical abuse by his mother. Charlie's situation was discovered after his mother had failed to return home one night. Just after midnight, the family's mutt began howling. Fortunately, an annoyed neighbor decided to break into the house to feed the mistreated dog. While looking for dog food, he opened what he thought was the pantry. It was then that he found little five-year-old Charlie locked in the small closet. Charlie was unconscious, nude, and covered in dried excrement. Upon arrival at the hospital, his body weight was twenty-two percent below normal for his age, and the doctor counted 12 circular scars that appeared to be cigarette burns. X-rays revealed several healed fractures of his legs, arms, and ribs. When Charlie's mother finally returned, she maintained that she'd left Charlie in the care of her boyfriend, whose whereabouts were now unknown.

When Grace first met Charlie he would rarely speak and never smiled. When Grace first attempted to talk about what had happened to him, he would just curl up into a fetal position and whimper. Several visits over many months were required before he could talk about it. Slowly, Charlie began to trust Grace and share more and more with her. By

CONTINUED ON PAGE 37

A Not-So-Grimm Tale

By Blakely Arlene Lord

This morning when I walk into my office, the brief is done. It's lying in the middle of my desk, all 14 perfect, lovely pages. A certification of service is placed neatly beside it, one of my nicer pens uncapped and ready for me to use to sign and date both documents.

I'm totally baffled.

When I left the office last night, my eyes felt dry and grainy beneath my contacts, my neck and shoulder muscles were stiff with tension, and the brief was still incomplete. I couldn't finish it. I couldn't even focus on it. Too much caffeine, too many 12-hour days, too little sleep. Way too little sleep. It all added up to blurred eyesight, a stomach full of acid, and a complete and utter inability to concentrate on anything more complex than a comic strip.

I swore I'd just take a short nap, but when I woke up on the cramped little sofa in Daniel's office two hours later (as a junior associate, my own office doesn't rate a sofa; just a couple of chairs and a coat rack, though to be honest, I supplied the coat rack myself) it was nearly 2 a.m. I finally admitted to myself it was time to call it a night and I stumbled wearily to my car. I kept the windows open the whole way home, afraid I'd fall asleep at the wheel.

I could have slept forever, but I set the alarm for 6:30 a.m. and when its ugly, incessant buzz intruded on my dreamless, coma-like sleep, I forced myself out of bed and into a scorching hot shower.

Clean, dressed, and fortified with about a gallon of coffee (my wounded stomach would just have to cope for one more day) I staggered into my office before eight, prepared to complete the brief. I've drafted briefs before, drafted some mighty fine briefs, if I do say so myself. I've also drafted motions, complaints, responses to interrogatories. I may only be a junior associate, but I graduated in the top third of my class. Law review, moot court. My name isn't embossed on the firm letterhead yet, but it's only a matter of time.

But for some reason, I've had trouble focusing lately, not just on this brief but on work in general. I'm tired all the time, exhausted really. And no matter how hard I work, no matter how many case files I close, no matter how many clients I satisfy, the piles of paperwork never seem to diminish. I need a vacation, but there's no time for one, there's never enough time. I promised myself I'd get away last month, but then the Zuckerman case heated up and the Peterson appeal shifted into high gear and, well, the vacation never happened.

I don't mind, usually. I like work. I like my clients and my co-workers (except for George, but no one likes him, it's kind of his signature). I like the intense research and the color-coded files, and the deli around the corner that delivers even after-hours. I like my office and my business cards and the way it feels to walk into a courtroom with a briefcase full of files and my blood pounding in my veins. Practicing law is exciting, it's invigorating, it's all I ever wanted to do, since I was a little girl.

The only thing I don't like is how sluggish I've been feeling lately, like no matter how hard I work it'll never be enough. No matter how much research I do I'll never know enough; no matter how many hours I spend in the office I'll never be able to keep up.

The firm has an EAP service, an employee assistance program. It's an 800 number, a crisis hotline and a referral service. It's supposed to be confidential, but something like that is hard to keep secret. It's a testament to how lousy I've been feeling lately that I actually contemplated calling the number and requesting a referral.

I've thought about using the EAP service, but I never thought I was crazy. Not until I walked into my office this morning and saw the brief on my desk. The one I didn't finish last night.

There has to be an explanation for this. Frowning, I pick up the brief and take a seat behind my desk without bothering to take off my jacket. That's how Marianne finds me when she steps into my office 45 minutes later.

"Knock, knock."

Marianne is the only person I know with this particular affectation. Rather than tapping on my door she says the words aloud, like a human sound-effects machine. It's irritating, but she's a fabulous paralegal and she

puts up with plenty of my own irritating quirks, so it all evens out.

"Is that the Adams Corp. brief?"

I glance up from the document I've been staring at disbelievingly.

"Uh, yeah. It seems to be."

I flip to the final couple of pages and skim through the conclusion for about the hundredth time. It's good, better than what I was wrestling with last night. A couple of major points have been fleshed out and clarified, and a few of the subtler aspects of the case law are explained more succinctly. It's as good as anything I've ever drafted. Better, even. The only problem is, I don't remember writing it. In fact, I'm fairly certain I didn't.

"Marriane-"

She raises an eyebrow at the inquiry in my voice, waiting for me to ask a question. But I say nothing, unsure what question to ask. *Did someone leave this brief on my desk in the dead of night, long after normal people were tucked in bed asleep?* Or better yet, *Say, have you noticed me losing my mind lately? And speaking of my recent insanity, do you think I might have finished an entire brief and forgotten about it?*

None of these questions seems designed to inspire confidence.

"It's nothing. Sorry. I guess I didn't sleep well last night."

"If you ask me," Marianne says handing me a latte and a scone, "you haven't been sleeping at all these days." Unsolicited advice. Another irritating quirk. But the latte tastes like heaven, especially compared to the gas station swill I chugged in the car on my way to the office, and the scone is still warm. Marianne must have stopped at the bakery around the corner on her way in.

I don't reply. Instead, I swallow a luscious bite of scone and sign the brief and certification of service.

"Can you give this to Larry to copy and mail?" I ask her. "Then let's take a look at discovery in the Shaw case. We need to have those documents sorted and tabbed before ten."

***

The day passes in a blur of meetings, phone calls, emails, and research. I barely have time to breathe, let alone to think about the origins of the mysterious brief. As the sun sets and the office empties out, I'm even more tired than last night, too tired to think about anything, including the motion I've been half heartedly working on for the past hour.

"This is ridiculous," I mutter, saving a very rough draft of the motion before logging off the computer. I scribble a couple of quick notes to remind myself of things I need to take care of first thing in the morning, grab my jacket, and slap the light switch on my way out. I'm not the last one to leave tonight, though the dimly lit hallway and the nearly empty parking garage suggest that only a few of my colleagues are burning the midnight oil, or, more precisely, the slightly past seven o'clock oil. It's pathetic when a short day at the office is "only" 11 hours. I really need that vacation.

But right now, I really need to get some sleep. My cramped nap on Daniel's sofa and the four hours I managed to get before my alarm sounded notwithstanding, I feel like I haven't slept in a million years. No amount of coffee can replace a little good old fashioned REM. Last night I was so tired I couldn't see straight; tonight I can barely *think* straight.

It's been a weird day and I'm tapped out. As I fall into bed, my last thought is to wonder with a little twist of humor whether the motion will be finished in the morning.

***

It is.

Against all reason, the motion is complete. It's even better than the brief, more tightly focused, like whoever drafted it had the chance to do some careful editing. Which makes sense, now that I think about it, since the brief was written in less than five hours. Last night, on the other hand, I left the office at the nearly reasonable hour of seven, and didn't return for over 11 hours. Whoever drafted the motion had twice as much time as they did to draft the brief.

Which leads me back to the question: who drafted the motion?

I briefly consider asking around to find out who stayed late the past couple of nights, but I'm not sure how to broach the subject. It seems awkward to waltz up to people at the water fountain and say, "So, written any good motions lately?"

I ponder this through two meetings and a teleconference. There's no way to solve my mystery without finding out who was in my office the past two nights. But I can't start grilling people like some kind of *Law and Order* police officer.

Thinking of the police finally gives me an idea. The firm is located on the top three floors of a high rise office building, a building with security cameras in every room. It was a big deal when they were installed two years ago, after some petty cash and a couple of cell phones went missing. Some of the lawyers grumbled ominously about civil liberties and invasion of privacy. Personally, I thought it was kind of creepy that some security guard would be able to watch me in my office, no matter what I was doing. But then the cameras were installed, and things pretty much went back to normal. Usually, I don't even remember they're there.

But now, those cameras are the answer to my prayers. Whoever invaded my office two nights in a row was recorded on tape. All I have to do is find someone to play that tape for me. If I knew one of the security guards I could ask him to show me the surveillance tape. Unfortunately, I don't know any of the guards.

Fortunately, another of Marianne's little quirks is her ability to remember names. She's got a mind like a steel trap.

"Marianne, what's the name of that security guard?" I ask.

"Which one?"

"You know, the one on duty at the front desk today." I'm deliberately vague. I don't care which guard I talk to as long as he has access to those security tapes.

"Oh, that's Henry." She's in the middle of something, so she doesn't pay much attention. I'm relieved that she doesn't ask me why I want to know the name of the guard. If she asked, I'm not sure what I'd tell her.

***

The tape Henry shows me makes no sense at first. There's no one there. My office is totally empty.

But as I stare at the footage of the dark, deserted room, I see ... something. Something like a flicker at the edge of the recording.

I lean forward, squinting at the grainy image. There's something there, but I can't figure out what it is.

"Can we pause this tape?" I ask Henry.

"Sure." Henry shows me how to work the controls, which are similar to the ones on my VCR.

"Thanks," I tell him. "I think I've got it."

That's my not-so-subtle hint for him to

leave, but Henry shows no inclination to return to his post in the main lobby. Now I have a dilemma. If there's something weird on this tape, I want to see it. The problem is, I don't necessarily want anyone else to see it ... at least, not until I know what it is.

I'm saved by the realization that it's nearly noon.

"Henry, isn't it lunchtime? I mean, don't you have a lunch break? I don't want to force you to stay here if you've got ... plans or something."

Henry doesn't have to be asked twice. He practically sprints out the door, leaving me alone with the tape.

It takes me a couple of tries to get the hang of the controls. I keep overshooting the elusive flicker when I try to pause the tape. Rewind, play, pause. Rewind, play, pause.

Just when I think I've been imagining that stupid flicker, that it's nothing more than a glitch in the tape, I manage to pause the video in just the right spot. The flicker is revealed.

It's a person. Or at least, I think it's a person. A really, really short person. A short person who appears for just a split second and then disappears like he was never there.

As I stare at the frozen image, I begin to notice more details. Strange details. Like the fact that the man on the screen isn't just short; he's tiny. And his ears are pointed. Not pointy, but pointed.

If I didn't know better, I'd swear the man on the tape is an elf.

***

If there's one thing we lawyers are good at, it's research. Westlaw, Lexis Nexis, Wikipedia. For the rest of the day I visit website after website, search engine after search engine, reading anything and everything I can find about elves. Santa's elves, Tolkein's elves, garden elves (which are like garden gnomes, only cuter).

Most importantly, I read about the shoemaker's elves.

According to the Grimm Brothers, while a poor but virtuous shoemaker slept, the elves made shoes for him. In the morning, the shoemaker awoke to find the most beautiful shoes he had ever seen. The shoemaker thanked the elves by leaving them gifts, and the elves brought the shoemaker and his wife luck all the days of their lives.

I don't believe in fairy tales, not since I was a kid, anyway. But you've got to admit, as far as fairy tales go, that's an awfully nice one. There aren't any maidens locked in towers or kids being lured to an early grave or monsters eating unwary travelers.

So, just for the sake of argument, what if the shoemaker's elves really exist? And what if they're still out there? And what if a shortage of shoemakers has forced the elves to diversify? What if some of the elves went to law school, hid in the nooks and crannies of classrooms, learned a new sort of skill?

I know it's crazy. I know these are the kind of theories that get lawyers disbarred. I know no one would believe me, even if I had more proof than a grainy flicker on the edge of a security surveillance tape.

But just in case, just to be on the safe side, I leave a box of doughnuts and a cup of coffee (with lots of cream and sugar) in my office every night these days.

According to my research, elves like snacks. ■

Blakely Lord grew up in Buies Creek, NC, and earned her JD from UNC-Chapel Hill. After practicing law with NASA for three years, she relocated to Seattle, WA, where she is currently the claims manager for Alaska Airlines.

Where Value Resides (cont.)

the time of trial, Charlie was able to tell 12 people about many of the things his mother had done to him.

And now, with his natural mother safely in the North Carolina Department of Corrections, Charlie had a new family, and he seemed to always have a smile for Grace.

"What do you have there Charlie?" Grace said as he approached carrying a cardboard box. "This is Petey, he's special." Grace peered down into the box to see a small baby Robin nestled in shredded newspaper.

"He does look special, Charlie, he's very pretty."

"No, not because he's pretty, he's special because I saved him."

"You saved him? How?" Grace glanced at her watch.

"Daddy and I found a nest in the yard with seven baby birds. Daddy said a cat got their mommy and they would probably die too. I put them in a box and used a light bulb to help keep them warm. I fed them and kept them beside my bed so I could watch them. It was a lot of work."

Grace felt tears begin to well up in her eyes, as she pictured him tenderly mothering the baby birds. Charlie had given them the love and care that he had been denied most of his life.

"That's wonderful Charlie, I'm very proud of you."

"Me too," Charlie said smiling. "Petey can't fly yet, but the doctor said he's doing real good."

"Where are the rest of the babies?"

Charlie looked at the ground; "All the others died."

"Oh Charlie, I'm so sorry," Grace said, as she gently placed one hand on his shoulder.

Charlie nodded, "Four of the them lived a long time and I was taking good care of them too, but Daddy said they just wasn't strong enough. But I tried really hard."

"I'm sure you did a very good job, Charlie. It's hard to understand why things like that happen, but I know you did everything you could to help them. I'm just sorry things didn't work out for you after all your hard work."

"But it did work out, Ms. Grace, I saved Petey," Charlie grinned, "They *all* would have died if I didn't do anything, but saving Petey was worth everything I did. That's why he's so special."

Graces' hand went to her lips as she absorbed the impact of his words. She slowly knelt down beside Charlie. With tears streaming down her face, she wrapped her arms around him and held him tightly.

"What's wrong Ms. Grace?" Charlie asked

She didn't respond, for what seemed like a long time to Charlie. But then, Grace moved her lips to his ear and softly whispered, "You're also very special, Charlie. Thank you."

"Ms. Grace, I wish you didn't have to leave."

"Don't worry, Charlie, I'm not going anywhere." ■

Orndorff graduated from Campbell University Law School in 1994. For the past nine years he has served as an ADA in the office of Howard S. Boney Jr. of the Seventh Prosecutorial District.

Report of the North Carolina State Bar Disciplinary Review Committee

On July 15, 2005, a special committee chaired by President-Elect Calvin Murphy and composed of State Bar Councilors and other distinguished citizens inside and outside of the legal community presented its final report concerning the State Bar's handling of a disciplinary case against two state prosecutors who failed to turn over exculpatory evidence to the defense in a capital murder case. The report of the Disciplinary Review Committee represents the consensus of the entire committee after an extensive investigation that included in-depth interviews with 25 persons having involvement in the case.

Although the committee expressed concern regarding several aspects of the State Bar's prosecution and characterized as deficient one aspect of its pretrial preparation, it found "no evidence of corruption, undue influence, or dishonesty in any respect." It also found that the State Bar's prosecutors "acted in good faith" and that the presentation of the case fell within the "wide parameters of acceptability."

Exhibits A and B referenced in the final report can be accessed on the State Bar's website (www.ncstatebar.org) on the homepage under "Current News and Events."

A. Committee Charge

To study and identify issues arising from the prosecution of David Hoke and Debra Graves for the State Bar to address and to recommend future actions and policies to be adopted as a result.

B. Factual Predicates

On April 14, 1995, the decomposing body of Allen Ray Jenkins was discovered in his home in Aulander, Bertie County, North Carolina.

The Bertie County Sheriff and the State Bureau of Investigation reviewed the circumstances of Allen Ray Jenkins' death. SBI Special Agent Dwight Ransome was the lead investigator.

Law enforcement officers interviewed individuals regarding when they last saw Jenkins alive.

Contained in the SBI investigative file were 16 transcribed statements of 17 Aulander residents who said they had seen Jenkins alive at some point after April 3, 1995. Dates ranged from April 6-10, 1995.

Early in the investigation, attention focused on two teenage girls—Crystal Morris and Shanna Hall (ages 15 and 16)—who were thought to be involved in the death of Allen Ray Jenkins.

At one point, Agent Ransome arranged for Gary Scott, the boyfriend of one of the girls, to tape record telephone conversations with Crystal Morris discussing the murder. During a conversation, Morris made statements that called her credibility into question.

Both Morris and Hall implicated Alan Gell as the person who shot and killed Jenkins with Jenkins' own shotgun. According to the girls, the murder occurred on April 3, 1995.

Alan Gell could not have committed the murder after April 3, 1995 because he was either out of state or in jail during that period.

Gell was later arrested and charged with the murder of Alan Ray Jenkins. Morris and Hall were also charged with First Degree Murder. Both Morris and Hall confessed to being involved in the murder of Jenkins.

David Beard, the local prosecuting attorney, requested the NC Attorney General's Office to assume prosecution of the case. David Hoke was assigned to prosecute the case. Debra Graves joined the prosecution team later.

David Beard provided Hoke with a copy of his prosecution file around mid February 1996. Hoke used the material from Beard as his "working file."

On or about May 21, 1996, Hoke received a complete copy of the SBI investigative file from the SBI Records Division.

According to Hoke and Graves, they never compared their working file with the complete investigative file received from the SBI to see if the files differed in any respect. However, the committee found no evidence

that the files differed.

Gell's defense lawyers requested exculpatory materials as required by *Brady v. Maryland* and its progeny. *See*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). Hoke and Graves did not provide any materials to the defense in response to the motion.

Neither Hoke nor Graves did anything to determine whether any information had been provided to the defense attorneys by David Beard, nor did they provide the defense attorneys access to their files after assuming responsibility for the prosecution of the case. According to David Beard, he provided no witness statements to the defense attorneys.

The taped May 1995 conversation between Morris and Scott was not transcribed until November 1996. Hoke and Graves had a copy of the tape and a typed transcription in their file. Apparently, they never listened to the tape, but reviewed the transcript.

Hoke and Graves acknowledged that the tape and transcript could have had impeachment value for cross examination of Morris and Scott. They did not believe, however, that the information constituted *Brady* material and consciously decided that neither the tape nor transcript needed to be provided to defense counsel before or during trial.

On two separate occasions, Hoke and Graves were ordered by two different superior court judges to provide all exculpatory or *Brady* materials they had in their files to defense counsel. On the first occasion, they did not provide the tape or transcript, nor did they provide all of the witness statements.

On the second occasion, Debra Graves told the court she was aware of some statements in the SBI files from individuals who reported seeing Jenkins alive after April 3, 1995, but said that when these folks were re-interviewed, they could not be specific and the state did not believe the statements were exculpatory.

The court then ordered the prosecutors to produce all the interviews they had for in camera review. They produced eight original interviews and eight re-interviews of the same witnesses. They did not produce eight other interviews of individuals all claiming to have seen Allen Ray Jenkins alive after April 3, 1995.

Alan Gell was convicted of first degree murder upon the testimony of Morris and Scott and sentenced to death. THERE WAS NO OTHER EVIDENCE LINKING GELL TO THE CRIME. Appeals were exhausted and new lawyers were appointed to handle post-conviction proceedings.

The Attorney General's Office provided post-conviction defense counsel with a copy of the entire SBI investigative file that contained ALL the witness interviews, the tape recording of conversations between Morris and her boyfriend about the murder, and the transcript of the tape recordings.

Thereafter, Gell filed a motion for appropriate relief based upon, among other things, the failure of Hoke and Graves to provide all the witness statements, the tape recording, and transcript to his defense counsel.

On December 16, 2002, the court awarded Gell a new trial based primarily upon Hoke and Graves' failure to provide the defense with all the statements, the tape recording, and the transcript.

The State Bar learned of the new trial through the media, opened an investigative file on its own initiative, and issued a letter of notice to both David Hoke and Debra Graves alleging several violations of the Rules of Professional Conduct, including Rule 3.3 (Lawyer making false statement) Rule 3.8 (Duty of Prosecutors), Rule 5.3 (Duty to supervise conduct of non-lawyer), and Rule 8.4 (Conduct prejudicial to the administration of justice).

In their response to the letter of notice, Hoke and Graves claimed that they relied in large measure upon the investigating SBI agent to let them know what was in the file. They never personally compared their working file with the complete SBI investigative file to determine if there were any differences in content.

After the State Bar concluded its investigation, the matter was presented to the State Bar's Grievance Committee. The Grievance Committee found probable cause to believe that violations of the Rules of Professional Responsibility had occurred and referred the matter to the Disciplinary Hearing Commission (DHC) for trial.

Carolin Bakewell, the senior Bar staff attorney, was personally acquainted with David Hoke and Debra Graves, as were other senior staff lawyers. Consequently, Ms. Bakewell delegated responsibility for prosecuting the case to David Johnson, a lawyer with considerable experience prosecuting disciplinary cases, to avoid the appearance of impropriety. Margaret Cloutier, a staff attorney with little experience with disciplinary prosecutions, was later assigned to assist Johnson with the case.

David Johnson prepared and filed a complaint against Hoke and Graves and took their depositions. According to Johnson, during their depositions, both Hoke and Graves admitted to all the underlying facts necessary to support violations of the Rules as alleged.

Before trial, Johnson and Cloutier attempted to contact SBI Agent Dwight Ransome and to interview him, but he refused to cooperate. Johnson and Cloutier did not issue a subpoena for Ransome's deposition testimony, nor did they make any other effort to obtain a voluntary statement from him.

Both Hoke and Graves admitted in their deposition testimony that they received from the SBI Records Division a full and complete investigatory file of the murder case, which contained all the reports of witness interviews. Additionally, Hoke and Graves acknowledged in their depositions that they were aware of a tape recording of a phone conversation involving a co-defendant, a transcript of which they had in their possession. They made a conscious decision to not turn over the transcript to defense counsel, believing it was *not* properly *Brady* material.

Believing that both respondents had admitted the essential conduct necessary to support violations of Rule 3.3 (Lawyer making false statement), Rule 3.8 (Duty of Prosecutors), Rule 5.3 (Duty to supervise conduct of non-lawyer), and Rule 8.4 (Conduct prejudicial to the administration of justice), Johnson and Cloutier tactically decided to present a "paper case," i.e., they would not call live witnesses for strategic reasons.

After a trial before the DHC, the hearing panel generally found the facts as alleged in the complaint and concluded that Hoke and Graves violated Rules 3.8(d), 5.3, and 8.4(d). The panel did not find that Hoke and Graves *knowingly* made a false statement of material fact to the court in violation of Rule 3.3.

The panel issued a reprimand to David Hoke and Debra Graves after finding that their conduct caused harm to the profession, to the administration of justice, and to the

public.

Shortly after the DHC trial, the State Bar began receiving criticism from the media, criminal defense lawyers, and others. One side complained that no prosecution should ever have been brought against Hoke and Graves. Other complaints generally centered on the following charges:

a. The Bar's disciplinary process was corrupt or biased in favor of prosecutors and against criminal defense lawyers.

b. Some improper influence was visited upon one or more members of the DHC Hearing Panel or upon Johnson and/or Cloutier, the prosecuting attorneys.

c. Staff counsel was less than diligent in the prosecution of the case: i.e. they did not present live testimony, did not call or interview certain witnesses, did not argue passionately the measure of discipline to be imposed, and did not adequately explain the law of *Brady* to the hearing panel.

d. The credibility of the disciplinary process suffered by the way the matter was handled and thereby has called into question the Bar's ability to effectively self-regulate its members

In response, then-State Bar president Dudley Humphrey convened a public meeting to give councilors the opportunity to pose questions.

The State Bar Council adopted the following motion at its annual meeting in October 2004: "The president shall appoint a committee of such size as deemed appropriate to give access to all perspectives, the committee to consist of lawyers and non-lawyers, to study and identify issues arising out of the Hoke-Graves controversy for the State Bar to address and to recommend future actions and policies to be adopted as a result."

As directed by the council, then-State Bar president Robert F. Siler commissioned a blue ribbon committee to carry out the charge of the State Bar Council.

Calvin Murphy, president-elect of the State Bar, was appointed to chair the committee, designated the Disciplinary Review Committee (DRC). Six (6) State Bar Councilors, five (5) non-councilor-lawyers, and five (5) non-lawyers agreed to serve. Non-lawyers include the Honorable James G. Martin, former governor of North Carolina; Dr. John W. Kuykendall, president-emeritus of Davidson College; Mark Ethridge, former managing editor of the *Charlotte Observer* Newspaper; Howard N. Lee, chair of the State Board of Education and former mayor of Chapel Hill, NC; and Dr. Harold L. Martin, chancellor of Winston-Salem State University. Council members of the Committee were Henry C. Babb Jr., James R. Fox, Edward T. Hinson Jr., M. Keith Kapp, Richard G. Roose, and Barbara B. Weyher. Members of the bar who were not councilors include James P. Cooney III, post conviction counsel for Alan Gell; Wade Smith, prominent Raleigh defense attorney; Jeff Hunt, district attorney for the 29th District; Fred H. Moody Jr., defense attorney and former president of the State Bar; and Willis Whichard, dean of the Norman Adrian Wiggins School of Law and former associate justice of the North Carolina Supreme Court.

The committee had its organizational meeting to coincide with the January 2005 council meeting. Committee members were provided complete materials from the prosecution of the disciplinary case and heard oral presentations from Councilor John McMillan, former chair of the State Bar's Grievance Committee and Joe Cheshire, criminal defense attorney speaking on behalf of the North Carolina Academy of Trial Lawyers.

Committee chairman Murphy appointed two subcommittees to investigate specific issues:

Subcommittee #1: Whether any corruption, bias, or improper influence affected the prosecution of Hoke and Graves or otherwise existed within the disciplinary process. Wade Smith was appointed to chair the subcommittee—"The Smith Subcommittee."

Subcommittee #2: Whether the disciplinary case against Hoke and Graves was prosecuted by staff counsel within an acceptable range of effective and competent lawyering by staff counsel. Fred Moody was appointed to chair this subcommittee—"The Moody Subcommittee".

The subcommittees met March 15, 16, and 17, 2005, and interviewed 24 persons, all of whom had some connection or relationship to the Hoke and Graves matter. Although no subpoenas were issued, the subcommittees called virtually all persons who were believed to possess relevant information. Only three people declined the invitation to be interviewed: respondents Hoke and Graves and their defense counsel, James Maxwell. Three persons who could not be present in Raleigh—Judge Erwin Spainhour, Judge Richard L. Doughton, and DHC Panel Member Karen Eady-Williams—were interviewed by telephone. All testimony was recorded by court reporters and all transcripts (attached as "Exhibit A") were published on the State Bar's official website.

C. Subcommittee Reports

1. The "Smith Subcommittee" conducted hearings for two full days and interviewed the following persons:

Tuesday, March 15:
Mr. David R. Johnson
Ms. Margaret Cloutier
Ms. Carolin D. Bakewell
Mr. Thomas F. Moffitt
Ms. Karen Eady-Williams [by telephone]
Mr. Richard T. Gammon
Judge Erwin Spainhour [by telephone]
Mr. Dudley Humphrey
Mr. Alan M. Schneider
Ms. Mary Pollard
Justice Robert Flynn Orr
Mr. Thomas Lunsford II

Wednesday, March 16:
Mr. Joseph B. Cheshire V
Mr. John B. McMillan
Mr. James Cooney
Mr. David Beard
Mr. Maynard Harrell
Judge Richard L. Doughton [by telephone]
Ms. Marguarite Watts
Mr. Stephen E.Culbreth
Mr. James Coman
Dr. M.G. F. Gilliland
Mr. Alan Gell

2. The "Moody Subcommittee" conducted hearings for two full days, March 16 and 17, 2005. Prior to beginning the hearings, Chairman Moody determined that it would be useful to the subcommittee to involve a prosecutor from another state bar who was experienced in the disciplinary process, to provide guidance on the standard for prosecuting disciplinary cases. The chair enlisted the assistance of William (Bill) P. Smith III, long time general counsel to the State Bar of Georgia, to provide his input and insight to the subcommittee. Mr. Smith was provided all of the written materials available to the subcommittee and participated in the witness interviews on March 16 and March 17.

Mr. Cooney and Mr. Moody, along with

Mr. Smith, conducted interviews on behalf of the subcommittee on March 16 and 17, 2005. Unfortunately Richard Roose, who was scheduled to participate, was unable to attend the interviews because of a court conflict.

Prior to commencing the interviews on March 16, Mr. Cooney provided an overview of the facts and circumstances surrounding the investigation of the murder of Allen Ray Jenkins and the prosecution of Alan Gell for that murder. Mr. Cooney represented Mr. Gell in post-conviction proceedings following Gell's first trial and in the retrial of Mr. Gell which resulted in an acquittal. A transcript of Mr. Cooney's presentation was subsequently made available to all members of the Disciplinary Review Committee.

Thereafter, the representatives of the "Moody Subcommittee" and Mr. Bill Smith interviewed or participated with the members of the "Smith Subcommittee" in the interviews of David Beard, M. G. F. Gilliland, Mary Pollard, Dwight Ransom, Steve Culbreth, Margurite Watts, Jim Coman, Maynard Harrell, Margaret Cloutier, Alan Gell, David Johnson, and Carolin Bakewell. Transcripts of these interviews as well as all other interviews conducted by the "Smith Subcommittee" have also been made available to the entire Disciplinary Review Committee.

The full "Moody Subcommittee" met again on the morning of April 12, 2005. At that time, the subcommittee received a written memorandum from Bill Smith providing his opinion as to the effectiveness of the prosecution of David Hoke and Deborah Graves and his view of certain criticisms of that prosecution. That report has been made available to the entire Disciplinary Review Committee and is attached to this report as "Exhibit B."

Following discussion, the "Moody Subcommittee" adopted a motion by unanimous vote, with one abstention, "That the subcommittee should report out that the North Carolina State Bar's prosecution of this disciplinary matter regarding these two lawyers [David H. Hoke and Debra C. Graves] fell within acceptable parameters."

D. Findings

The committee makes the following findings:

1. There is no evidence that the North Carolina State Bar engaged in any intentional misconduct in the preparation of its case and the presentation of its evidence in the matter of David Hoke and Debra Graves. There is no evidence of corruption, undue influence, or dishonesty in any respect. The subcommittee saw no evidence of "cronyism," deliberate lack of effort, or misconduct on the part of:

The North Carolina State Bar.

Witnesses before the panel of the Disciplinary Hearing Commission.

The panel of the Disciplinary Hearing Commission.

Persons interested on either side of the matter.

Nevertheless, the State Bar's "paper only" presentation and its acceptance of the defendants' version of the facts led to a perception by some that there was something wrong with the process.

2. There is no evidence that people who opposed David Hoke and Debra Graves made efforts to compromise the process. There is no evidence that persons who supported Mr. Hoke and Ms. Graves sought to compromise the process. There is no evidence of secret telephone calls to the DHC Panel. There is no evidence that the State Bar deliberately "took it easy" on Hoke and Graves.

3. There is evidence that Judge Erwin Spainhour called State Bar Counsel Carolin Bakewell sometime before the Hoke and Graves hearing. The "Smith Subcommittee" questioned both Judge Spainhour and Ms. Bakewell about this call. Both Ms. Bakewell and Judge Spainhour stated that the purpose of the call was an expression by Judge Spainhour of his belief that the State Bar did not have jurisdiction since the matter had already been adjudicated by a superior court earlier. But Ms. Bakewell did not view the call as inappropriate, and the State Bar continued its prosecution of the case in the same manner as it had before the call. Judge Spainhour did not make any request of Ms. Bakewell nor did he urge leniency. The call violated no rule and apparently had no impact on the State Bar's proceedings. There is no other evidence of other such telephone calls to the State Bar or to members of the Disciplinary Hearing Commission Panel.

4. The North Carolina State Bar ("State Bar") appropriately and on its own initiative began and continued an investigation into the conduct of David Hoke and Debra Graves for their actions during their prosecution of Alan Gell for capital murder.

5. The State Bar prosecutors eventually assigned to pursue this matter—David Johnson and Margaret Cloutier—conducted the proceeding against Hoke and Graves in the good faith belief that the conduct engaged in by Hoke and Graves was unethical and required sanction. Both Johnson and Cloutier believed strongly that ethical norms required more of these prosecutors than a claim of ignorance for not reading their file. Indeed, Cloutier specifically characterized the actions of these prosecutors as "appalling."

6. The State Bar, its staff, and the elected leadership have cooperated fully and without hesitation in the work of this committee. While believing that the State Bar acted appropriately at all times in handling the Hoke and Graves matter, neither the staff nor the elected leadership have attempted to influence or coerce the inquiry of the committee or its conclusions.

7. The State Bar prosecutors faced a difficult case in this proceeding based on the highly stringent requirements of Rule 3.8 of the Revised Rules of Professional Conduct. This Rule defines as unethical only "knowing" conduct in the failure to provide evidence ". . . that tends to negate the guilt of the accused or mitigates the offense . . . ." Rule 3.8 does not make the failure to provide what is known as *Brady* material unethical unless such material deals directly with innocence or mitigation; nor does it require that prosecutors diligently seek out such information. Indeed, the position of David Hoke and Debra Graves at the DHC hearing was that Rule 3.8 did not even require them to read their own file, let alone ask for or inspect other files. The State Bar—and eventually the DHC—rejected this interpretation of Rule 3.8, and appropriately so.

8. The State Bar prosecutors were successful in their proceeding against David Hoke and Debra Graves, ultimately proving to the Disciplinary Hearing Panel that each had acted unethically in the prosecution of Alan Gell for capital murder.

9. The presentation of this case by the State Bar prosecutors fell within the wide parameters of acceptability. David Johnson and Margaret Cloutier acted within the wide range of effectiveness expected of State Bar prosecutors. Johnson and Cloutier acted in good faith and with the sole motive of prov-

ing Hoke and Graves' conduct to be unethical.

10. The failure of the State Bar prosecutors to interview at an early stage in the investigation or to depose under subpoena SBI Special Agent Dwight Ransome, the only eyewitness with firsthand knowledge of the failure of Hoke and Graves to produce evidence of Alan Gell's innocence, constituted a deficiency in the prosecution.

11. The committee also feels that the State Bar Prosecutors employed certain procedures that generated areas of concern for the committee. They include:

(a) Not reviewing the original Gell prosecution files of the Special Prosecution Division of the Office of the Attorney General, the division that employed Hoke and Graves during Alan Gell's prosecution;

(b) Not interviewing or calling to testify David Beard, Esq., the former elected district attorney of Bertie, Northampton, and Hertford Counties, once it became clear that Hoke and Graves were suggesting that his office failed to transmit the witness statements to them;

(c) Not considering the use of information from Dr. M. G. F. Gilliland to challenge the credibility of Hoke and/or Graves;

(d) Not, at a minimum, (i) keeping Alan Gell apprised of the proceedings against Hoke and Graves; (ii) submitting Gell's vulnerability as a victim in this case as an aggravating factor, and (iii) acknowledging the impact of the proceedings on Alan Gell.

12. The matters identified in paragraphs 10 and 11 above did not affect the outcome of the DHC proceeding.

13. The State Bar presented its case against Hoke and Graves as a "paper case" only, and did not call live witnesses to advance its allegations. This was the result of a strategy adopted by the prosecution after receiving the responses of Hoke and Graves to the grievance and complaint, and taking their depositions. Based upon those responses and their deposition testimony—which Bar counsel viewed as admissions of the conduct alleged—Bar counsel elected to rely exclusively on the admissions and deposition testimony of Hoke and Graves and the stipulated facts of the case. The "paper case" presentation left some members of the public with the perception that the matter was not being vigorously prosecuted and, in this particular situation, may not have had as effective an impact on the Disciplinary Hearing Commission Panel as live testimony might have had.

The committee recognizes that DHC hearings are not jury trials and that dramatic or emotional presentations do not generally advance a position in this forum. The committee also acknowledges that stipulations of fact substantially aid the efficient conduct of DHC hearings. However, in the case against Hoke and Graves, members of the DHC panel who heard the case reported that the "paper case" presented by the State Bar did not fully satisfy them. Nonetheless, the panel found by clear and convincing evidence that David Hoke and Debra Graves, by their conduct, violated three separate Rules of Professional Responsibility.

14. The committee learned of practices before Disciplinary Hearing Panels which appear flawed.

(a) The committee was informed that it was "standard practice" not to submit briefs or memoranda on legal or other complex topics to hearing panels until just prior to deliberations. Witnesses who described this practice indicated that this was done for tactical reasons, so as to prevent effective rebuttal from the opposing party. However, this type of late briefing appears to have only heightened the confusion of the hearing panel and may have resulted in important legal issues not being completely understood by panel members prior to their deliberations.

(b) The committee was further informed that "mitigation evidence," which is to be considered only in the "penalty" phase of a disciplinary proceeding, was routinely presented in the "violations" phase, under the guise of a need to accommodate the schedules of mitigation witnesses. In the context of this case, such a practice led to a perception at least that the numerous judicial officials who testified on behalf of the character of Hoke and Graves had a significant influence on the "violations" phase.

15. This case was ultimately assigned to David Johnson (assisted by Margaret Cloutier) because the more senior members of the State Bar staff felt that they should not be assigned to the matter as a result of their acquaintance with one or both of the respondent attorneys. At the time of the assignment, Mr. Johnson had been a deputy bar counselor for a total of approximately eight-and-a-half years, from 1979 until 1985 and after January of 2001. In May 2004—nearly one year into the investigation and several months after the filing of the complaint in this case—he was assigned Cloutier as an assistant. She had just joined the Bar staff after serving four years as an assistant district attorney, and this case was her second case before a Disciplinary Hearing Panel. Both Johnson and Cloutier carried significant case loads including other prosecutions and ongoing investigations. The committee does not find David Johnson to be inexperienced. However, the committee determined that the State Bar does not have in place a procedure for securing other counsel when experienced State Bar counsel are not available to prosecute a particularly significant or complex matter.

16. There is not presently in place a formalized procedure for evaluation of State Bar counsel, and the line of authority for supervision of State Bar counsel is somewhat blurred. The committee does not believe that this situation had any impact on the prosecution of Hoke and Graves. However, the committee believes that this situation needs to be reviewed.

17. Disciplinary Hearing Commission Panel members who served on the Hoke and Graves case reported their disappointment with the State Bar's presentation, but did not take up the matter during the hearing, ask enough questions to satisfy themselves, or request other witnesses. It appeared that the DHC Panel was not active in pursuing themes in the hearing which had been abandoned or not fully pursued by the State Bar. It appeared that the panel may not have been as fully aware of its authority to actively supervise the course of the hearing from the bench as it could have been. Further, it appeared that the panel was not aware that it had subpoena power.

18. The Disciplinary Hearing Commission Panel should have felt comfortable taking a more active role in the hearing, questioning where appropriate and assuring a full and complete review of the available evidence. To the extent the Disciplinary Hearing Commission Panel did not know it could assume an active role, it should be reminded through educational efforts that these tools are available.

19. During subcommittee hearings, Alan

Gell alleged that the State Bar is more persistent and aggressive in prosecuting criminal lawyers than it is in disciplining prosecutors. He was asked if he had any statistical information to support this assertion, and he said he would produce it later. As of the date of this report, Mr.Gell has failed to produce any such information. Although it was beyond the scope of the committee's charge, through its interviews the committee uncovered no evidence of bias toward or against prosecutors or defense attorneys in the discipline process.

E. Conclusions

1. All meetings of the full Disciplinary Review Committee, and all subcommittee meetings, were conducted consistent with North Carolina's Open Meetings Laws, and the public and press were invited. Members of the public attended, as did representatives of television and print media. Meetings were properly advertised, and the public and press received proper notice. Neither the full DRC nor either of the subcommittees conducted any meetings which were not open entirely to the press and to the public, and no decisions were made by the full DRC or a subcommittee except in public.

2. During the hearings, the subcommittees asked probing and well-considered questions and gave no quarter to any witness based on position or standing within the bar or the legal profession. The questions were designed to ferret out any wrongdoing and to assess the performance of State Bar Counsel who prosecuted the disciplinary case against David Hoke and Debra Graves.

F. Recommendations

1. The officers of the State Bar should consider adopting a policy for the provision of qualified other counsel in circumstances where experienced State Bar counsel are not able to prosecute a particular matter. The committee further recommends that the State Bar take from this experience an understanding that there may exist a need for live witnesses and a more robust and energetic response in matters that may be of a more profound interest to the general public, particularly in matters involving public officials or where a conflict of interest exists. The State Bar counsel's office should consider adopting a "high profile" case protocol, with the advice and counsel of the State Bar Grievance Committee chairman, to address instances including, but not limited to: a) the prosecution of a public official; b) the decision to put on a "paper case"; c) matters of high public interest.

2. Rule 3.8 should be redrafted to make it more consistent with the duties imposed more than 40 years ago on prosecutors in *Brady v. Maryland*, and this redrafting should also make plain that prosecutors must make an effort to inquire into and search for the existence of such material in order to fulfill their ethical obligations. It is the understanding of the committee that the State Bar's Ethics Committee is currently reviewing Rule 3.8, and the committee defers to the Ethics Committee's determination.

3. The Disciplinary Hearing Commission should reconsider the practice of permitting "mitigating" evidence to be introduced during the "violations" phase of a disciplinary proceeding. Instead, such evidence should be received only in the penalty phase. In this way, a disciplinary hearing panel can avoid the perception that well-connected attorneys may influence disciplinary findings by who they know, rather than by what they did.

4. The State Bar should reconsider and re-examine its practice concerning the submission of briefs on legal and other issues to a disciplinary hearing panel. The State Bar might unilaterally decide to provide its briefs in complex matters to the hearing panel in advance of the hearings so that the panel members would have the time and opportunity to consider the briefs prior to trial. If strategic considerations prevent such unilateral action, the State Bar and the panels should work together to establish prehearing briefing schedules to identify and brief in advance the legal or factual issues that are expected to arise during the course of a proceeding. The committee believes that providing briefs in advance of the hearings will assist future panels in understanding the legal and factual issues in controversy, and will remove the perception that complicated matters are considered only at the last minute.

5. The State Bar should consider allocating additional resources to provide for more prosecutorial staff and additional technology for the prosecution of cases in disciplinary proceedings. While the committee unanimously believes that the prosecutors for the State Bar are diligent and dedicated, the case load imposed on them necessarily limits the ability of even the most conscientious attorneys to completely and fully investigate their cases.

6. The State Bar should provide training for State Bar counsel stressing the need to be cognizant of public perception of the State Bar's investigations in disciplinary matters and of the need in all cases to fully explore the facts relating to the "guilt or innocence" of the accused attorneys and the appropriate discipline to be imposed.

7. The officers of the State Bar should consider implementing a formal job evaluation procedure for State Bar counsel and review the line of authority for supervision of State Bar counsel.

8. In disciplinary proceedings, the State Bar should acknowledge the presence of citizens who are victims of possible lawyer misconduct, interview them for the purpose of learning whether they possess useful information for the hearing panel, and notify them of scheduled public proceedings.

9. Although the State Bar provides orientation sessions for new members of the Disciplinary Hearing Commission, and although there is a handbook for new members, the State Bar should reconsider whether these efforts are sufficiently thorough in view of the apparent failure of the DHC Panel in this matter to understand it had the power to be more fully involved in the hearing process and to subpoena witnesses if it felt the need to do so.

10. The State Bar staff should always strive for professional excellence in its pursuit of just results in each proceeding before the Disciplinary Hearing Commission.

Respectfully submitted this 12th day of July, 2005.

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